82-26

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in the

Supreme Court

of the

United States

October Term, 1981

THE FIRST STATE BANK OF MIAMI,
Petitioner

vs.

GOTHAM PROVISION COMPANY, INC. ET AL.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF

Robert J. Paterno
James C. Pilkey
Taylor, Brion, Buker & Greene
1451 Brickell Avenue
Miami, Florida 33131
305-377-6700
Counsel for Petitioner

QUESTIONS PRESENTED

The Court below held that cattle sellers who had a lengthy history of entrusting their cattle to a meat packer despite knowledge they had not, and would not, receive payment for several weeks, qualified as "cash sellers" within the Amended Packers and Stockyards Act of 1921 (7 U.S.C. §196) and a regulation promulgated by the Department of Agriculture. It further held that, consistent with Congressional intent, these sellers are allowed to reach into the hands of a bank to recover full payment of their claims against a bankrup meat packer. The questions presented are:

1. WHETHER THE COURT BELOW ERRED IN HOLDING RESPONDENTS WERE "CASH" CATTLE SELLERS ENTITLED TO TRUST PROTECTION UNDER 7 U.S.C. §196 OF THE AMENDED PACKERS AND STOCKYARDS ACT OF 1921?

2. ASSUMING RESPONDENTS ARE CASH SELLERS UNDER THE ACT, DOES A THIRD PARTY ACTING IN GOOD FAITH AND IN THE ORDINARY COURSE OF BUSINESS HAVE ANY PROTECTION AGAINST BECOMING AN INVOLUNTARY INSURER OF A MEAT PACKER'S DEBTS?

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OCTOBER TERM 1981

NO.

THE FIRST STATE BANK OF MIAMI,
Petitioner,

v.

GOTHAM PROVISION COMPANY, INC., ET. AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, The First State Bank of Miami (hereinafter the "Bank") respectfully requests a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 11, 1982, rehearing denied on May 13, 1982.

The respondents are: Gotham Provision Company, Inc., a bankruptcy debtor ("Gotham"), and cattle sellers, Lykes Brothers, Inc. ("Lykes"), the United States Sugar Corporation ("U.S. Sugar"), Rogers Farms Inc. ("Rogers"), D.R. Kilpatrick ("Kilpatrick"), W.D. Roberts ("Roberts"),

Ronnie Perkins ("Perkins"), and Robbie Addison ("Addison"). The United States Department of Agriculture made an appearance at trial and as *amicus curiae* on appeal and is generally referred to as the Secretary or the USDA.

Reference to the appendix to this petition will be by the letter "A" followed by a page number (e.g. A-5). Record references will be by appropriate abbreviation.

OPINIONS BELOW

The opinion of the Court of Appeals is reported. *In re Gothan Provision Co.*, 669 F.2d 1000 (5th Cir. 1982). (A-1). The order of the District Court is unreported. *In re Gotham Provision Co.*, No. 79-247-Bk-JAG-W (S.D. Fla. July 30, 1980). (A-34). The findings of fact and conclusions of law of the bankruptcy court are reported in the West Company's new "Bankruptcy Reporter." *In re Gotham Provision Co.*, 1 Bankr. 255 (Bankr. S.D. Fla. 1979) (A-40).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 11, 1982. A timely petition for rehearing was denied on May 13, 1982 and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulation primarily involved are: 7 U.S.C. §196, 7 U.S.C. §204, 7 U.S.C. §228a, 7 U.S.C. §228b and 9 C.F.R. §200.201. Due to their length they are reproduced in the appendix to this petition. (A-54).

STATEMENT OF THE CASE

This case arose as a result of a petition in bankruptcy filed by the Gotham Provision Co. The controversy involves the conflicting claims of the Bank as a duly perfected secured party and cattle sellers seeking to reach into the Bank's hands to grasp funds already paid against an outstanding loan.

The cattle sellers cause of action is based on the amended Packers and Stockyards Act of 1921. (Pub. L. 94-410, 90 Stat. 1249, 7 U.S.C. §181 et. seq.) (the "Act"). The amendments to the Act were designed to prevent the recurrence of packer bankruptcies and the sometimes harsh results these bankruptcies wreaked on certain cattle sellers under the Uniform Commercial Code as enacted by the various states. One of these amendments, now codified at 7 U.S.C. §196, provides the major focus of concern here. (A-54). Section 196 provides a means for a limited number of cattle sellers, those who sold their cattle in cash transactions, to take limited priority over a secured party in the event of a packer bankruptcy. To achieve this, the statute creates a trust in favor of cash sellers until such time as they are paid. A cash sale is one where the seller does not expressly extend credit to the buyer. 7 U.S.C. §196(c). To qualify for these benefits, the claimant must file with the Secretary of Agriculture within prescribed time limits. §196(b).

Gotham enjoyed longstanding business relationships with each of the cattle sellers. These relations began well before the passage of the amended Act and continued through Gotham's bankruptcy. (TR. 142).

Generally, the relevant particulars of each transaction between Gotham and the respondents would be arranged orally. These particulars would include such things as

manner or means of pick-up or delivery, whether a transaction was on a "live weight" or "grade and yield" basis,[1] and how and when payment was to be be made. (TR. 130-31, 457). Gotham paid respondents for their cattle by mailing them a check anywhere from three weeks to several months after the cattle were purchased. This payment practice originated before the amended Act and continued after its passage. There is no dispute between the parties about the length of time allowed for payment; the controversy centers on whether such sales constitute cash or credit transactions.

The Bank's relationship with Gotham worked in the following manner.

After Gotham purchased cattle, the cattle were slaughtered, dressed, placed in inventory and offered for sale to various customers such as grocery stores and butcher shops. Sales by Gotham to these customers were on both a cash basis, i.e., money or check in hand concurrent with delivery, and on a credit basis, i.e., time allowed for payment after delivery. (TR. 103-09). When cash sales were made, the money stayed with Gotham never finding its way to the bank. (TR. 108).

However, when Gotham's customers purchased on credit, Gotham would go to the Bank and receive 80% of the face value immediately. The Bank made these advances continually up to a $450,000 limit.

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[1] These terms are used to designate the manner in which purchase price is calculated.

In a live weight transaction, the purchase price can be determined immediately simply by weighing the animals and multiplying their total weight times the price per pound or per hundred weight, which the parties have agreed on.

In a grade and yield transaction, the purchase price is not determined until the animals are slaughtered, dressed and assigned a grade. The price per pound is commensurately higher.

The outstanding balance of Gotham's account fluctuated depending on such things as the number of credit sales and the rate at which the various grocery stores and butcher shops paid their bills. Reduction of the account was done on a routine, regular basis. (TR. 58-59). The Bank had no control over the amount outstanding at any given time. As long as Gotham was making credit sales the amount outstanding would stay at or near the $450,000 limit. When sales slowed or stopped, the balance outstanding was automatically reduced, assuming the grocery stores and butcher shops paid their bills.

Gotham filed its bankruptcy petition on March 9, 1979. Shortly thereafter, an agent of the Department of Agriculture went through Gotham's files. He deemed all of the respondents "cash" sellers and called them to inform them of this status. He also informed all respondents that if they intended to file a trust claim under 7 U.S.C. §196, notice must be filed with the Packer and the Secretary within the statutory period. The timeliness of certain claims has been litigated and the Bank will not raise this issue before this Court.

Throughout this entire sequence of events, the Bank continued to operate in the normal course of business. The Bank continued advancing funds against accounts receivable until March 16, 1979. (TR. 71). From the period beginning February 12, 1979, through bankruptcy, these advances totalled $751,000. (Sept. 7, TR. 211). These funds, representing the proceeds of Gotham's inventory, went directly to Gotham. Where this money went from there has not been determined. Upon learning of the bankruptcy, the Bank immediately froze all accounts. (TR. 67). The amount of the loan still outstanding is $112,330, plus interest. (TR. 63).

Thereafter, pursuant to court order, the Bank established a special escrow account to collect receivables. At the time of trial, there was $74, 439 in this account. (TR. 65). An additional $26,201 which should have gone into this account was taken by Gotham and placed in its "debtor-in-possession" account. (TR. 173-74).

On April 20, 1979, the Bank instituted an adversary proceeding under the Bankruptcy Act to determine the validity, priority and extent of its lien on the escrow fund. The cattle sellers took no action against Gotham but instead counterclaimed seeking to reach into the hands of the Bank to obtain payment in full.

On October 26, 1979, the Referee rendered the decision subsequently affirmed by the District Court. He found that even under these facts the cattle sellers were cash sellers, and that by virtue of that status and a statute regulating packers, the Bank was liable for repaying Gotham's debts plus costs and interest. The Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. This Is a Case of First Impression Raising Significant and Potentially Recurring Questions About the Amended Packers and Stockyards Act of 1921.

This is a case of first impression twice over. It is the first case dealing with the amended Packers and Stockyards Act of 1921 to reach the courts of appeal. It is also the first case where cattle sellers have relied on the Act in attempting to reach into the hands of a third party to secure payment for their cows.

As in Justice Cardozo's proverbial hard case, this case presents fertile grounds for making bad law. On one hand, the Bank has the unenviable task of arguing against cattle

sellers a statute admittedly passed to protect cattle sellers. On the other hand, should the cattle sellers prevail, no bank can risk the potentially enormous liabilities the Fifth Circuit decision imposes, and it appears Congress has protected cattle sellers by destroying their marketplace. The petitioner believes the Act, if properly interpreted, is a remarkably useful piece of legislation capable of balancing all competing interests. However, a proper interpretation will have to come from this Court.

There are several reasons why this Court should grant a writ of certiorari and strike the final balance. The reasons are simple and require little amplification.

As evidenced by repeated passages in the legislative history, Congress has attached great significance to the Act.

> Livestock is probably the single most important source of protein in the American diet. Thus, livestock producers occupy a position of unique national importance.

[1976] U.S. Code & Cong. Adm. News 2267, 2272.

Right or wrong, the Fifth Circuit's decision will have maximum impact on the day-to-day operations of the multi-billion dollar livestock industry. Though they may not be aware of it, the American public will also be affected every time they purchase meat. The ability of a meat packer to obtain credit and the cost of such credit is at stake in these proceedings. The outcome of this case will be reflected on meat counter price tags.

The USDA has made an appearance at every stage of these proceedings. The Secretary filed a motion for leave to participate in oral argument as *amicus curiae*. Pursuant to F.R.A.P. 27, the Secretary was required to list "extraordinary reasons" why participation should be allowed. Among

these reasons were the significance of this case as one of first impression in the courts of appeal and the need to establish a national standard for administering the statute.

This Act also squarely presents one legislative response to the conflict between farmers and secured lenders. This situation is currently of great national concern and is the subject of numerous bills pending in both houses of Congress.

Farmer Joseph Cryts captured the public eye when he removed his soybeans from a bankrupt grain elevator and sold them despite a court order that those soybeans were part of the bankrupt's estate. Because of the inequities of this situation, a federal grand jury refused to indict Cryts.

Several bills and resolutions have been introduced as a result of the Cryts incident. *(See e.g.,* S.2486, H.R. 6034, H.R.6335, H.R.6452 and H.R.6461, all 97th Cong. 2d Sess. (1982). Still more bills are being filed. Although petitioner does not know whether any of the proposed bills will use it as a model, the amended Act was a response to similar inequities which confronted cattle sellers. Unfortunately, the Fifth Circuit decision makes the amended Act as inequitable for third parties dealing with meat packers as prior law was for cattle sellers. We have traversed from one extreme to the other when clear Congressional intent was to find a middle ground. That middle ground is readily available but can only be supplied by this Court.

Finally, the Fifth Circuit decision is open to serious dispute for both legal and policy reasons. The present and future problems this decision creates are substantial and promise to reoccur. To illustrate, the remainder of the petition presents a stylized history of the Act and the future ramifications of the Fifth Circuit decision.

II. The Fifth Circuit Decision Renders the Amended Act Unworkable and May Recreate the Very Evil Which Prompted Passage of the Original Act.

In 1974, this Court decided *Mahon v. Stowers*, 416 U.S. 100 (1974). In *Mahon*, the respondent cattle seller was left unpaid when a meat packer went bankrupt. In an effort to gain priority over secured creditors, the cattle seller claimed he was the beneficiary of a trust created by the Packers and Stockyards Act. The Fifth Circuit agreed, but this Court reversed holding that in the absence of any specific mention of such a trust in the Act, state law priorities would control. *Id.* at 111.

That same year a depressed economy led to a rash of meat packer bankruptcies. In many instances, secured creditors escaped unharmed while unpaid cattle sellers remained unpaid.

> Producers and farmers have the right by law to reclaim items sold to a bankrupt party. But when the livestock producer sells to a packer, it is often impossible for him to reclaim his livestock. In the five to seven days before a bad check bounces the producer's steer is a steak on a dinner table or a McDonald's hamburger.
>
> The bonding (§204) and trust provisions (§196) are specifically aimed at this problem.

42 Fed. Reg. 49, 926 (1977) (Remarks of Sen. Clark).

It was to counter the inequities inherent in this situation that Congress passed the amended Act.

After extensive hearings detailing the positions of the various affected industries, Congress came up with H.R.

8410 which was subsequently passed into law.

> What is needed... is legislation that will afford a measure of protection to the livestock producer and feeder and yet not be so restrictive as to reduce competition in the livestock as to reduce competition in the livestock slaughtering business. H.R. 8410 accomplishes this dual objective.

[1976] U.S. Code Cong. & Adm. News, 2267, 2279

The reasons Congress acted are easily typified as follows. A packer receives a loan from a bank for $400,000. To secure repayment of this loan, the packer grants the bank a security interest in its inventory, accounts receivable and the like.

At the time of the loan the packer had an inventory worth $500,000. If the packer depleted that inventory by selling to a local grocery store, the resultant debt owed by the grocery store to the packer replaced the inventory as security for the bank loan. Ideally, the combination of inventory and accounts receivable would always meet or exceed the $500,000 level. However, as the years go by the maintenance of this level is sometimes only an ideal and a bank, deeming itself insecure, would foreclose on its security. Before the amended Act, state law afforded a bank priority over cash cattle sellers.

Under these circumstances, such results were unduly harsh and unfair. For example, on Monday, a cattle seller delivers cattle to a packer receiving a check for the purchase price. Before the check is even deposited for collection, the cattle are slaughtered, become inventory and the seller loses the ability to reclaim his product if the check should bounce. Thus, a bank foreclosing an old loan on Tuesday reaped the full benefits of the seller's labor without providing any new value.

To remedy this inequity, Congress passed several amendments to the Act including 7 U.S.C. §196. Section 196 requires that all livestock purchased by a packer in cash sales and all inventories, receivables *or* proceeds derived from cash sales be held by the packer as trustee until full payment is received by such cash sellers. Further, the Act requires a packer to pay all cattle sellers on a cash basis if they so desire. 7 U.S.C. §228b. Additionally, Congress increased the scope of the term packer, 7 U.S.C. §191; required packers to be bonded, 7 U.S.C. §204; gave cattle sellers a private cause of action against packers, 7 U.S.C. §209; and gave the Secretary authority to obtain injunctive relief, 7 U.S.C. §228a.

Now, in the typical case, the bank's security interest attaches only to that portion of the inventory or receivables not derived from cash sales. The remainder of the inventory, receivables *or* proceeds is held by the packer as trustee.

Congress intended the net effect of these amendments to be a carefully balanced bill. "This is not an anti-packer bill or pro-producer bill, it is a bill that we believe is carefully balanced, addressing the problem to provide for a good, safe market and a safe market is what will best serve the consumer." Cong. Rec., May 6, 1976, P. H4011 (Remarks of Rep. Hightower).

In this balanced market, everything moves with dispatch. In simplest terms, if everyone pays as they go, bankruptcies are unlikely to occur, but if bankruptcies do occur, no one is likely to be hurt too badly.

At this juncture, the role played by the Bank in the instant case must be examined. This case does not present the situation where a bank relies on its secured antecedent debt to gain priority over a producer. Instead, the First State Bank was providing a service not only endorsed but

essential under the amended Act.

A large portion of a packer's sales to grocery stores and the like are on a credit basis. As the Justice Department noted during the hearings on the proposed bill, packers, unlike cattle sellers, cannot demand "cash only" from their customers. Any attempt to do so would be an anti-trust violation. *Proposed Amendments to the Packers and Stockyards Act of 1921; Hearings on H.R. 8410 and Related Bills Before the House Sub. Comm. on Livestock and Grains of the House Comm. on Agriculture,* 94th Cong. 1st Sess. 1-194 (1975). Therefore, the packer must have a method of turning its credit sales into immediate cash in order to pay its cash cattle sellers on the immediate basis envisioned by the Act. 7 U.S.C. §228b. This was the service provided by the Bank.

Following each step of a hypothetical transaction demonstrates the way this service worked.

Monday - Gotham enters into a verbal agreement with a cattle seller to purchase 200 cows on a "grade and yield" basis. The cows are loaded onto trucks and shipped to Gotham's plant.

Tuesday - Early in the morning, the cattle are slaughtered, dressed, graded, weighed and placed in inventory. At this juncture, the purchase price is determined to be $100,000. If these cows were purchased in a true cash transaction, then, pursuant to 7 U.S.C. §228b, Gotham is required to transfer $100,000 to the cattle seller by the close of business on Wednesday.

Wednesday - Gotham takes the processed meat derived from the 200 cows out of inventory and sells it to a local grocery chain for $150,000. The grocery chain signs an invoice promising to pay for the meat in 30 days, thus

creating a receivable. At this point, Gotham has sold the meat it derived from the cows and is required to pay the cattle seller in a few hours, yet Gotham will not receive payment for its product for at least 30 days. To solve this dilemma, Gotham takes the receivable to the First State Bank of Miami. The Bank pays Gotham 80% of its face value or $120,000. The receivable is thereby turned into proceeds of the cattle sale and is returned to the packer. The packer is under a statutory duty to hold the proceeds in trust for the cattle seller. 7 U.S.C. §195.

All that is needed to complete the cycle is for the packer to oblige his trust by paying the cattle seller for his cows. In the instant case, Gotham chose not to do so. It dispatched the funds to points unknown. The respondents have made absolutely no attempt to collect the funds from Gotham eventhough they have a private cause of action which survives bankruptcy. See 7 U.S.C. §§191, 209 and *Fillippo v. S. Bonaccurso & Sons, Inc., 466* F.Supp. *1008, 1018* (E.D. Pa. 1978). Instead, they pursue the Bank.

There is no rationale for holding the Bank liable for Gotham's breach of trust. The packer is the statutory trustee, not the bank. At all times, the Bank operated in good faith and in the ordinary course of business. The Bank did nothing to precipitate any of the respondents losses. The net result of this judgment is that the Bank, and anyone else who makes the unfortunate mistake of dealing with a meat packer, is *a fortiori* transformed into a provider of trustee liability insurance.

This is not the result Congress intended. The legislative history makes it clear that the only way to provide insurance to cattle sellers "would be [by] pledging the full faith and credit of the United States to cover any unpaid for livestock. In reality, that is the only way you guarantee that no one will suffer any conceivable loss." *Report of Business*

Meetings on H.R. 8410, House Comm. on Agriculture, 94th Cong., 2d Sess. 129 (1976) (Remarks of Rep. Foley, Chairman).

For the questionable privilege of providing financing to a small meat packer, the Bank now finds itself liable for paying Gotham's debts. This result does not flow naturally from the statute; rather, the opposite is true. To reach this result, the courts below had to find: that Congress intended to stretch the definition of the term "cash sale" light years beyond its usual commercial meaning; that cattle sellers are not required to prove any of the money they are taking really belongs to them; that a cattle seller's acts and omissions can never amount to estoppel; and that, despite Congress' deliberate choice of a trust provision over other available remedies, principles of trust law do not apply.

If the courts below are correct in this interpretation of the Act, the following illustrates what Congress has apparently authorized.

A cattle seller and a packer agree to extensive sales over a one-month period. When asked how he wants to get paid, the seller tells the packer to hold the money for a couple of months so he can get capital gains treatment for the cattle. The packer hands him a "credit letter' conforming with 9 C.F.R. §200.201 and asks him to sign it "just to keep the Secretary of Agriculture happy." The seller says "sure, I'll send it to you in a couple of days," and, upon returning home, dumps the letter in the garbage can.

Shortly thereafter, the deliveries of cattle begin and continue on a daily basis. The packer slaughters the cattle and sells the meat to local grocery stores. The grocery stores promise to pay in 30-90 days. The packer takes the promise to the Bank and turns it into immediate proceeds.

As the sales continue, the packer receives more and more money now that is not due and owing until much later. He also sells out his inventory and, in the true fashion of rascals everywhere, decides to abscound. For the sake of argument, before abscounding, the packer calls up the seller and informs him of his plans. The seller says, "you can't do that, you owe me hundreds of thousands of dollars." In response, the packer agrees to a large "under the table" payment just to keep things quiet.

Several days later, the seller receives a phone call from the United States Department of Agriculture informing him that he is a cash seller. "I am?" says the seller. "You must be," says the USDA, "there's no credit letter on file, and if you want to preserve your trust rights, make sure we get a telegram by tonight." "But what good will that do," asks the seller? "The packer has abscounded, and he sold all his inventory." "That doesn't matter," says the USDA, "we'll take it from the bank." "But," says the seller, "isn't that where he got the money to abscound with in the first place?"

We need change the facts only slightly to make this "worst case analysis" and several situations in the instant case remarkably similar.

It is unlikely that Congress intended to pass an act so susceptible to abuse. It is equally unlikely that Congress intended to vest cattle sellers with the power to create secret liens traditionally abhorred by the law.

Under these circumstances, no lending institution can even remotely consider financing a meat packer. Any loan officer who undertakes such a commitment with knowledge of its possible results will be guilty of gross misfeasance for subjecting his employer to such a risk. Indeed, when the Act was first passed, many lenders removed themselves from the market rather than risk the chance that the courts would

properly limit its scope.

> Many financing institutions have simply refused to extend credit to meat packers, processors and distributors because of this uncertainty. [As to the scope of the §196 trust benefits]. Most sub-committee members view this development with grave concern and recommend that in the future such legislation be opposed.

Burke, *UCC Annual Survey: Secured Transactions*, 32 Business Lawyer 1133, 1154 (1977).

However, Congress manifestly did not intend to drive banks out of the business of financing packers. Congressman Thone, a chief proponent of Pub. L. 94-410, is credited with the following statement about §196:

> [I]t need not and should not prevent a packer from obtaining a loan on his livestock, meat products and accounts receivable, for normally the amount of unpaid cash sellers outstanding at any one time should not be very great.

Cong. Rec. May 6, 1976 at H4010-11.

The record reflects, Gotham, a comparatively small packer, had average purchases in excess of one million dollars during the requisite 30-day period. It is obvious that the chief proponent of the Act could not have made the above-quoted statement if Congress intended all sellers within any 30-day period be deemed cash sellers simply because they threw a piece of paper in a garbage can.

Nevertheless, according to the Fifth Circuit, a Bank has no way to protect itself, even under these circumstances, from becoming liable for its customer's breach of trust. If this decision stands, all banks, large and small, would be well advised to remove themselves from this market.

Without the service provided by the bank in the instant case, none but perhaps the very largest meat packers could afford to continue in operation. As previously noted, packers, unlike cattle sellers, do not have the statutory ability to demand that their customers purchase only on a cash basis. Therefore, most of their sales to grocery stores and the like will continue to be on a credit basis. Without this financing, the packers will lose the use of money owed on a sale for the 30 to 90 days it takes to receive payment. Under such circumstances, the viability of *any* commercial enterprise is sorely tested. However, even if a packer could afford to stay in business, it could never stay in compliance with the Act and its regulations. To stay within these tenets, a packer must have absolutely superior cash liquidity. With their money tied, packers will be unable to meet the demands of legitimate cash sellers. Without accounts receivable financing, all but the largest packers are likely to buy and sell themselves out of existence in very short order.

When this occurs, we will have recreated the very situation the Packers and Stockyards Act was designed to prevent. "The chief evil feared is the monopoly of the packers enabling them unduly and arbitrarily to lower prices to the shipper who sells and unduly and arbitrarily to increase the price to the consumer who buys." *Stafford v. Wallace,* 258 U.S. 495, 514-15 (1922).

Of course, even the largest of packing houses would be loathe to operate without accounts receivable financing. Therefore, they will seek a way to secure it. There would now be only one situation in which a bank would continue to finance a packer, and that is where all the cattle purchases were made on credit. Technically, this should not happen since a cattle seller who intends to sell on a cash basis has a statutory right to demand prompt payment with the concomitant causes of action if that right is refused. But, commercial realities being what they are, as the market

dries up and the large packing houses regain their former positions, few sellers will be likely to refuse.

It may take several years for these results to occur, but there is ample precedent for such wholesale changes in the meat industry. One such change in marketing practices is what led to the passage of the amended Act in the first place. [1976] U.S. Code Cong. & Adm. News 2267, 2270. Therefore, unless the court below erred in its holding, it appears Congress has wasted an inordinate amount of legislative and judicial time composing and passing an act that will ultimately leave cattle sellers in a worse position than they started in.

Under no circumstances could the Bank's arrangement with Gotham do anything but help cattle sellers. It could not, and did not, hurt these cattle sellers in any manner. Unlike the typical case which prompted passage of the Act, the Bank gave new value in the form of proceeds *after* every sale. According to the respondents' own expert witness, the bank gave Gotham $751,000.00, nearly three times the respondents' claims, during the period when the subject sales occurred. (Sept. 7 TR. 211). The breach of trust occurred when Gotham failed to hold these proceeds for the respondents.

If the Bank can be liable here then so is every single entity or person who did business with Gotham. The phone company, the IRS, Gotham's employees and Gotham's attorneys all received funds generated by cattle sales. The logical extension of the Fifth Circuit decision mandates that each and every person doing business with a packer, from banks to plumbers, must monitor the packer's books on a daily basis before performing any services on the packers behalf. This is the only way to insure that inventory you have already paid for, or money received for services rendered, will not be subsequently ripped from your hands by an

alleged cash cattle seller. *See e.g., Matter of Harmon,* 11 Bankr. 162 (Bankr. N.D. Tex. 1980). (Cattle sellers may take "unearned" attorney fees).

The Bank has committed no crime, precipitated no loss and has earned the money it was paid. Yet, the bank alone faces a $260,000 judgment. If the law affords no protection to third parties dealing with meat packers, the least due process requires is some notice. The statute itself provides nary a hint.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

ROBERT J. PATERNO
JAMES C. PILKEY
TAYLOR, BRION, BUKER & GREENE
1451 Brickell Avenue
Miami, Florida 33131 (305) 377-6700
Counsel for Petitioner

June 30, 1982

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in the

Supreme Court

of the

United States

October Term, 1981

THE FIRST STATE BANK OF MIAMI,
Petitioner

vs.

GOTHAM PROVISION COMPANY, INC. ET AL.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITIONER'S BRIEF

Robert J. Paterno
James C. Pilkey
Taylor, Brion, Buker & Greene
1451 Brickell Avenue
Miami, Florida 33131
305-377-6700
Counsel for Petitioner

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In re GOTHAM PROVISION COMPANY, INC.,
Debtor/Debtor in Possession,

The FIRST STATE BANK OF MIAMI,
Appellant,

v.

GOTHAM PROVISION COMPANY, INC., et al.,
Appellees.

No. 80-5682

United States Court of Appeals,
Fifth Circuit,*
Unit B

March 11, 1982

Secured lender instituted adversary bankruptcy proceeding to determine validity, priority and extent of lien claimed on bankrupt packer's escrow account containing collections on packer's accounts receivable, and unpaid cash sellers of livestock filed counterclaim against lender to recover amounts necessary to compensate them fully for sales of cattle made to the packer. The Bankruptcy court entered judgment in favor of sellers, and review was sought in the district court. The United States District Court for the Southern District of Florida, Jose A. Gonzalez, Jr., J., entered judgment, and the lender appealed. the Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) livestock purchases were "cash sales" and were not exempt from trust provisions of the Packers and Stock-

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

yards Acts requiring that packers purchasing livestock on cash basis hold such livestock and accounts receivable and proceeds derived from resale of such livestock in trust for benefit of unpaid cash sellers; (2) under the Packers and Stockyards Act, sellers had priority over lender to which packer had given security interest in inventories and receivables subject to trust, and sellers were entitled to recover proceeds of such receivables to extent of outstanding balance on cash sales even though sellers could not trace particular accounts receivable derived from sale of their livestock; (3) unpaid cash seller's filing of notice with Secretary of Agriculture was required in order for seller to have claim under Packers and Stockyards Act to trust; and (4) assignee of all of unpaid cash seller's accounts receivable could perfect claim under section of Packers and Stockyards Act.

Afirmed in part, reversed in part, and remanded.

1. Trade Regulation 872

Livestock purchases were "cash sales" and were not exempt from trust porvisions of the Packers and Stockyards Act requiring that packers purchasing livestock on cash basis hold such livestock and accounts receivable and proceeds derived from resale of such livestock in trust for benefit of unpaid cash sellers where packer did not obtain from sellers writing clearly indicating that sellers extended credit to packer and thereby waived trust provisions of the Act. Packers and Stockyards Act, 1921, §§ 2(a), 201, 206, 206c, 409 as amended 7 U.S.C.A. §§ 182, 191, 196, 196(c), 228b.

See publication Words and Phrases for other judicial constructions and definitions.

2. Trade Regulation 872

Under section of the Packers and Stockyards Act requiring packers purchasing livestock on cash basis to hold such livestock and accounts receivable and proceeds derived

from resale of such livestock in trust for benefit of unpaid cash sellers, unpaid cash sellers had priority over lender to which packer had given security interest in inventories and receivables subject to such trust, and sellers were entitled to recover proceeds of such receivable to extent of outstanding balance on cash sales even though sellers could not trace particular accounts receivable derived from sale of their livestock. Packers and Stockyards Act, 1921, §§ 1 et seq., 206 as amended 7 U.S.C.A 99 181 et seq., 196.

3. Trade Regulation 872

Where there is commingling of livestock products such that it is impossible to determine whether packer's inventories and accounts receivable have been derived from livestock purchased by packer in cash sale or credit sale, all of packer's inventories, accounts receivable and proceeds attributable to livestock sales are, for purposes of Packers and Stockyards Act section requiring packers purchasing livestock on cash basis to hold such livestock and accounts receibable and proceeds derived from resale of such livestock in trust for benefit of unpaid cash sellers, subject to such trust to extent of amount owed to unpaid cash sellers, and only burden upon cash sellers in order to recover in such case is to prove balance due to them and existence of floating pool of commingled inventory of livestock products, accounts receivables and proceeds derived from cash and credit livestock sales. Packers and Stockyards Act, 1921, §§ 1 et seq., 206 as amended 7 U.S.C.A. §§ m181 et seq., 196.

4. Trade Regulation 872

Filing of notice with Secretary of Agriculture was required in order for unpaid cash seller to have claim under Packers and Stockyards Act to trust, and alleged actual notice of Secretary arising from Secretary's giving notice to livestock producers of bankruptcy of packer did not satisfy

requirements of the Act. Packers and Stockyards Act, 1921, §§ 206, 206(b), 409 as amended 7 U.S.C.A. §§ 196, 196(b), 228b.

5. Time 3

Rule governing computation of time periods in connection with proceedings in federal courts applies for determining timeliness of unpaid cash seller's filing with Secretary of Agriculture of notice required to maintain claim to trust packers are required under Packers and Stockyards Act, 1921, §§ 1 et seq., 206 as amended 7 U.S.C.A. §§ 181 et seq., 196; Fed, Rules Civ. Proc, Rules 6, 6(a), 28 U.S.C.A.

6. Trade Regulation 872

For purposes of determining whether a cash seller's notice was timely filed with Secretary of Agriculture so as to entitle seller to maintain claim under Packers and Stockyards Act provision requiring packers purchasing livestock on cash basis to hold such livestock and accounts receivable and proceeds derived from resale of such livestock in trust for benefit of unpaid cash sellers, stamp applied by Secretary to notice papers was conclusive evidence that filing occurred no later than date of the stamp, but it was not conclusive evidence that the notice was not received in Secretary's office at earlier date. Packers and Stockyards Act, 1921, §§ 206, 206(b) as amended 7 U.S.C.A. §§ 196, 196(b).

7. Trade Regulation 872

Assignee of all of unpaid cash seller's accounts receivable could perfect claim under section of Packers and Stockyards Act requiring packers purchasing livestock on cash basis to hold such livestock and accounts receivable and proceeds derived from resale of such livestock in trust for benefit of unpaid cash sellers. Packers and Stockyards

Act, 1921, §§ 1 et seq., 206 as amended 7 U.S.C.A. §§ 181 et seq., 196.

Appeal from the United States District court for the Southern District of Florida.

Before MORGAN, TJOFLAT and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

This appeal presents the first opportunity for a court of appeals to construe the trust provisions of the 1976 amendments to the Packers and Stockyards Act of 1921 ("the Act"), 7 U.S.C.A. § 181 *et seq.* (West 1980). In the aftermath of numberous bankruptcies of meat packers in the early 1970's. Congress amended the Packers and Stockyards Act to provide certain livestock producers with some means to ensure that they would receive payment for livestock sold to packers. Section 206 of the amended Act, 7 U.S.C.A. § 196 (West 1980),[1] requires that packers who purchase livestock

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1. Section 206 of the Packers and Stockyards Act, 7 U.S.C.A. § 196 (West 1980), reads as follows:

(a) It is hereby found that a burden on and obstruction to commerce in livestock is caused by financing arrangements under which packers encumber, give lenders security interest in, or place liens on, livestock purchased by packers in cash sales, or on inventories of or receivabless or proceeds from meat, meat food products, or livestock products therefrom, when payment is not made for the livestock and that such arrangements are contrary to the public interest. This section is intended to remedy such burden on and obstruction to commerce in livestock and protect the public interest.

(b) All livestock purchased by a packer in cash sales, and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, shall be held by such packer in trust for the

on a cash basis hold such livestock and accounts receivable and proceeds derived from the resale of the livestock in trust for the benefit of unpaid cash sellers.

This case arose from the financial demise and bankruptcy of Gotham Provision Co., Inc. ("Gotham"), a meat packer. The First State Bank of Miami ("the Bank") entered into a financing arrangement with Gotham on November 9, 1976, whereby the Bank would advance funds to Gotham and take as collateral a security interest in gotham's inventories, accounts receivable and proceeds from the sale of meat. Gotham's financial fortunes turned for the worse in 1978; the Bank was aware of Gotham's financial problems. Ultimately, Gotham filed a Chapter XI petition in bankruptcy on March 9, 1979. Approximately one month prior to the filing of the bankruptch petition, the outstanding balance due to the Bank on the Gotham loan was $450,000, and, by March 16, 1979, seven days after the filing of the bankruptcy petition, this amount was reduced to $112,324.19. At that time, the bankruptcy judge, at the request of the United States Department of Agriculture ("USDA") ordered

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benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers: *Provided,* That any packer whose average annual purchases do not exceed $500,000 will be exempt from the provisions of this section. Payment shall not be considered to have been made if the seller receives a payment instrument which is dishonored: *Provided,* That the unpaid seller shall lose the benefit of such trust if in the event that a payment instrument has not been received, within thirty days of the final date for making a payment under section 228b of this title, or within fifteen business days after the seller has received notice that the payment instrument promptly presented for payment has been dishonored, the seller has not preserved his trust under this subsection. The trust shall be preserved by giving written notice to the packer and by filing such notice with the Secretary.

(c) For the purpose of this section, a cash sale means a sale in which the seller does not expressly extend credit to the buyer.

that all future collections of accounts receivable be held in escrow. This escros account contained $74,439.85 at the time of the trial in the bankruptcy court below.

Several livestock producers who had allegedly made cash sales of cattle to Gotham during February, 1979, were left unpaid, and they notified Gotham and the Secretary of Agriculture ("Secretary") of their intent to preserve their rights under the trust provisions of the Packers and Stockyards Act. The Bank thereafter instituted an adversary proceeding in the bankruptcy court to determine the validity, priority and extent of the lien it claimed on the escrow account by virtue of its security interest in the accounts receivable. The Bank named Gotham and certain livestock producers, including D.R. Kilpatrick ("Kilpatrick"), Lykes Brothers, Inc. ("Lykes"), Ronnie Perkins ("Perkins"), W. D. Roberts ("Roberts"), Billie Rogers Farm ("Rogers"), United States Sugar Corporation ("U.S. Steel"), Robbie Addison ("Addison"), W & D Dairy and W. Garcia as defendants. The latter two defendants did not make an appearance in the bankruptcy court, and their claims to the escrow account were extinguished by the bankruptcy judge. The other defendants answered by alleging that the trust provisions of the Packers and Stockyards Act gave them priority over the escrow funds. In addition, they filed a counterclaim against the Bank to recover the additional amounts necessary to compensate them fully for the cash sales of cattle made to Gotham on the theory that the funds used to decrease Gotham's loan balance were subject to the trust created by § 206 of the Packers and Stockyards Act.

The bankruptcy judge held that the livestock producers were cash sellers as defined by the Act and were thereby entitled to the protection of § 206. The judge further held that the floating pool of trust assets to which these producers held a valid claim included both the escrow account and the money used to decrease Gotham's debt to the Bank.

Thereby, the bankruptcy judge ruled that the producers had priority over the escrow funds and that they should recover against the Bank on their counterclaims. The district court affirmed.

On appeal to this court, the Bank raises several claims of error. First, it argues that the court below erred by holding that the livestock producers were cash sellers. Second, the Bank argues that even if the producers are cash sellers, the statute should not be construed to allow these producers to have priority over the Bank's security interest in the accounts receivable and to force the Bank to remit to them moneys derived from the accounts receivable which had been applied to reduce Gotham's debt to the Bank. Finally, the Bank argues that certain parties should not be permitted to take advantage of the trust provisions of the Act since these parties did not properly file their claims in accordance with the Act. We reverse the judgment below pertaining to appellee Perkins and remand for further findings on the filing issue. We reject each of the other arguments raised by the Bank and therefore affirm with respect to all other appellees.

I. CASH SALES VERSUS CREDIT SALES

Congress clearly limited the application of the trust provisions of § 206 of the Packers and Stockyards Act to transactions where:

(1) The commodities sold are "livestock," as defined in § 2(a) of the Act, 7 U.S.C.A. § 182 (West 1980);

(2) The purchaser of the livestock is a "packer" as defined in § 201 of the Act, 7 U.S.C.A. § 191 (West 1980);

(4) The cash sellers have not received full payment for their livestock;

(5) The packer in question makes average annual purchases of more than $500,000; and

(6) The cash sellers have preserved the trust within the required period by giving notice to the packer and by filing that notice with the Secretary of Agriculture.

Where each of these conditions has been satisfied, the packer is required to hold in trust for the benefit of unpaid cash sellers any livestock purchased in cash sales, inventories of meat or other products derived from such livestock, and accounts receivable or proceeds obtained through the sale of these items by the packer.

[1] The Bank's first argument is that the § 206 trust does not arise in this case because the transactions in question in this case are not cash sales. We find this assertion to be without merit. The Act itself provides specific guidance for the determination of whether a transaction is a cash sale. Subsection (c) of § 206 defines a "cash sale" to be "a sale in which the seller does not *expressly* extend credit to the buyer." 7 U.S.C.A. § 196(c) (West 1980) (emphasis added). Section 206 itself does not indicate what constitutes an express extension of credit, but § 409 of the Act, 7 U.S.C.A. § 228b (West 1980) provides some assistance.[2] Section 409

2. Section 409 of the Act, 7 U.S.C.A. § 228b (West 1980), provides:

(a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, o dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of

requires that purchasers of livestock pay the seller the full amount of the purchase price before the close of the next business day following the purchase and transfer of possession of the livestock, or, if the transaction is on a "grade and yield" basis, before the close of the next business day following the detemination of the purchase price.[3] However,

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transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchases shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

(b) Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a) of this section. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

(c) Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

3. "Grade and yield" purchases may be distringuished from "live weight" purchases in that in the former transaction, the purchase price is not determined until the dattle are slaughtered and the yield of meat from the carcass is graded and weighed, whereas in the latter, price is based upon the gross weight of the cattle at the time of purchase. Grade and yield purchases would therefore carry a higher price per pound. This statutory proviso accounts for the necessary delay in fixing the "grade and yield" price.

§ 409(b) allows the parties to effect payment in another manner so long as the parties expressly agree in writing, in accordance with the terms and conditions specified by the Secretary of Agriculture, to such a financing arrangement. In essence, § 409 of the Act presumes that all livestock sales are cash sales unless the parties expressly agree in writing to make the transaction a credit sale. Read in this context, the language of § 206 defining "cash sales" to include all sales where the seller has not expressly extended credit contemplates that unless the parties clearly agree in writing to a credit arrangement, the transaction is a cash sale.[4]

The legislative history of the 1976 amendments supports this view. the Senate Committee on Agriculture and Forestry recognized that § 409 would be critical to determining whether a transaction was a cash or credit sale. Discussing the statutory provision found in § 409(a) allowing the parties to modify in writing the terms of payment established in § 409(a), the Committee stated:

> Nothing in section 7 would preclude a packer and a producer from agreeing in writing that the packer may transmit through the mails, by the close of the next business day, payment for livestock purchased. Such action would not result in the producer being considered a credit seller. If, however, the agreement is for payment beyond the close of the next business day, the producer would be considered a credit seller and as such would forfeit his rights under the trust.

S.Rep. No. 932, 94th Cong., 2d Sess. 12, *reprinted in* [1976]

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4. Two opinions written by Judge Hannum have reached the same conclusion. *See Fillippo v. S. Bonaccurso & Sons, Inc.*, 466 F.Supp. 1008, 1020 (E.D. Pa.1978); Hedrick v. S. Bonaccurso & Sons, Inc., 466 F. Supp. 1025, 1032 (E.D. Pa. 1978)

U.S. Code Cong. & Ad. News 2267, 2278. Since the "agreements" referred to in this excerpt are required by § 409(b) to be in writing, Congress clearly intended that a writing specifying terms of payment which extended beyond the time allowed in § 409(a) would establish that the transaction is a credit sale. Likewise, where the parties made no such writing, payment would be due within the two-day period specified in § 409(a), and the transaction would thereby be a cash sale. The existence of a writing which merely provides that payment may be made by mailing a check to the seller within the § 409(a) time period would not, as the legislative history notes, transform a cash sale into a credit sale because such an agreement is not an extension of credit.[5]

Other passages in the legislative history support the rule that an extension of credit exempt from trust protection must be in writing. Rep. Poage, the chairman of the House Committee on Agriculture's Subcommittee on Livestock and Grains, explained in his opening remarks on the floor of the House that if a livestock producer intends to enter into a credit arrangement, "he has to *write it out* so he can fully understand that he is not going to be paid until a certain date." 122 Cong.Rec. 12862 (May 6, 1976) (emphasis added). In addition, Rep. Thone, the principal sponsor of the 1976 amendments, in responding to a question from one congressman regarding whether packers could continue the practice of orally agreeing with producers for

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5. An example of such an agreement to authorize payment by check through the mails is found in the following agreement between appellee Roberts and Gotham:

> On this date, I am entering into an agreement with Gotham Provision Company, Inc., authorizing them to pay for and mail checks in payment for cattle purchased from us as they have done in the past. This pertains to section 206 of the packers and stockyards regulations.

Plaintiff's Exhibit 18. This agreement does not expressly extend credit and thereby does not constitute evidence of a credit transaction.

payment to occur at a time after the next business day after the purchase and then pledging the accounts receivable from the sale of the meat to a bank, stated that:

> [T]here is a provision in this legislation which clearly allows that practice to continue. If they want to agree on payment a week from Monday or two weeks from Monday, the first of next year or whatever, they can do that by *written contract* at any time they so desire to do so.

122 Cong.Rec. 12878 (May 6, 1976) (emphasis added).

The regulations issued by the Secretary of Agriculture under the authority of § 409(b) are consistent with this interpretation of the Act. Under 9 C.F.R. § 201.200 (1981),[6]

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6. 9 C.F.R. § 201.200 provides:

(a) No packer whose average annual purchases of livestock exceed $500,000 shall purchase livestock on credit, and no dealer or market agency acting as an agent for such a packer shall purchase livestock on credit, unless: (1) Before purchasing such livestock the packer obtains from the seller a written acknowedgment as follows:

On this date I am entering into a written agreement for the sale of livestock on credit to _____, a packer, and I understand that in doing so I will have no rights under the trust provisions of section 206 of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 196, Pub.L. 94-410), with respect to any such credit sale. The written agreement for such selling on credit

Covers a single sale.

Provides that it will remain in effect until (date).

Provides that it will remain in effect until canceled in writing by either party. (Omit the provisions not applicable.)

Date _____

Signature _____

(2) Such packer retains such acknowledgment, together with all other documents, if any, setting forth the terms of such credit sales on which the purchaser and seller have agreed, and such dealer or market agency retains a copy thereof, in his records for such time as is required by any law, or by written notice served on such person

packers whose average annual purchases exceed $500,000 may not purchase livestock on credit unless the packer obtains from the seller a written acknowledgment that the seller agrees to make the sale on credit and that the seller waives his rights under the trust provisions of the Act, 7 U.S.C.A. § 196 (West 1980). The regulations also require the packer to retain the acknowledgment and to give a copy of the acknowledgment to the seller.[7]

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by the Administrator, but not less than two calendar years from the date of expiration of the written agreement referred to in such acknowledgment; and

(3) Such seller receives a copy of such acknowledgment.

(b) Purchasing livestock for which payment is to be made by a draft which is not a check, shall constitute purchasing such livestock on credit within the meaning of paragraph (a) of this section. (See also § 201.43(b)(1)).

(c) The provisions of this section shall not be construed to permit any transaction prohibited by § 201.61(a) relating to financing by market agencies selling on a commission basis, or by § 201.68 relating to financing packers by dealers or vice versa.

7. In brief, the Bank raises some question about the effect of this regulation. Specifically, the Bank argues that since the definition of "cash sale" in § 206(c) does not explicitly state that a writing is required to establish a credit sale, the regulations may not impose such a writing requirement. As outlined above, we interpret § 206(c), in conjunction with § 409 of the Act and the legislative history, to require a writing in order to establish a credit sale under the Act. Therefore, we believe that the regulations clearly "carry into effect the will of Congress as expressed by the statute." *Ernst & Ernst v Hochfelder*, 425 U.S. 185, 214, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668 (1976); *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 399, 80 L.Ed. 528 (1936). Since there is no question that the Secretary was empowered by § 228(b) to issue this regulation, since the regulation certainly is a substantive rule affecting individual obligations, *see Morton v. Ruiz*, 415 U.S. 199, 232, 94 S.Ct 1055, 1073, 39 L.Ed.2d 270 (1971), and since there is no argument that the procedureal requirements of the Administrative Procedure Act were not complied with, we hold that the Bank's argument that the regulations do not have the force and effect of law is devoid of merit. *See United States v. Harvey*, 659 F.2d 62 (5th Cir. 1981) (setting forth the test for determining the "force and effect" of a regulation).

For the foregoing reasons, we hold that a livestock purchase is not exempt from the trust provisions of § 206, unless the packer obtains from the seller a writing which clearly indicates that the seller has extended credit to the packer and thereby waived protection of the trust provisions of the Act. In the instant case, there is no evidence that Gotham obtained any such writing from any of the appellee livestock sellers. The record reflects that on October 22, 1977, gotham did send to parties from whom it had purchased cattle a form for their signatures which basically tracked the language of the suggested form in § 201.200 for a written acknowledgment of an express extension of credit. However, none of the appellees signed such a form or any writing to indicate that credit had been expressly extended. Based on the record in this case, we hold that the appellees were cash sellers within the meaning of the Act.

The Bank raises two additional arguments on this question which merit some attention. First, the Bank argues that the credit or cash nature of a sale need not be determined by a writing, but may be ascertained by examining the course of dealings between the parties. Specifically, the Bank urges that the court should find a credit sale under the Act whenever the parties to the livestock transaction have an expectation that payment would occur after the end of the two-day period established by § 409.[8] Although in the abstract such a rule might have some appeal, it is not the rule that Congress selected. To adopt the Bank's view would do violence to the wording of the statute, the intent of Congress, and the regulations which reasonably implement the statute. This we decline to do.

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8. Of course, the mere failure of a packer to comply with the prompt payment provisions of § 409 of the Act cannot serve as the basis for holding that the transaction is a credit sale, since such an interpretation would destroy the trust provisions of the Act. *See Hedrick v. S. Bonaccurso & Sons, Inc.*, 466 F.Supp. at 1032.

The Bank also points to "writings" which it argues support the conclusion that certain of the appellees were not cash sellers. the writing pointed to in the case of appellee U. S. Sugar is an invoice which U. S. Sugar sent to Gotham following the sale of cattle in question. However, the face of that invoice indicates that the terms of the sale were "cash." Defendant's Composite Exhibit 11. With respect to appellee Lykes, the Bank argues that an invoice reflects an agreement to terms of payment as "weekly 2-2." Plaintiff's Composite Exhibit 29. Lykes argues in brief that this is not an invoice but merely a delivery receipt. The document in question is unsigned, and no party has pointed to any evidence explaining the meaning of "weekly 2-2."

No matter how one chooses to characterize these documents, it is clear to this court that they do not constitute an express extension of credit. Not only do these documents fail to contain the language required by 9 C.F.R. § 203.200 or the substantial equivalent thereof, they do not indicate the express intention of the parties to enter into a credit arrangement, nor do they indicate that the sellers intended to waive protection of the trust provisions of the statute. These documents do not, therefore, transform the appellees from cash sellers to credit sellers.

II. APPLICATION OF THE TRUST PROVISIONS TO THE BANK

The second major argument advanced by the Bank is that even if the appellees are cash sellers, the trust provisions of the Packers and Stockyards Act should not be construed to give the cash sellers a superior interest in Gotham's accounts receivable as against the Bank. The Bank urges that common law trust principles should govern the enforcement of the § 206 trust; therefore, the appellees must at minimum trace their sales into the accounts receivable over which the Bank held a security interest in order to

recover. We are unable to reconcile the Bank's arguments with the language of the statute and its legislative history.

It is clear that the purpose of the 1976 amendments to the Packers and Stockyards Act of 1921 was to provide some future protection for livestock sellers against the type of serious financial loss that cattlemen experienced when some major meat packers went bankrupt in the early 1970's. Of principle concern to Congress was the bankruptcy of American Beef Packers in 1975, at the time one of the largest meat packers in the country. That bankruptcy affected many farmers throughout the country who had delivered their entire year's output of cattle to american Beef Packers and did not receive payment. The provisions of the Uniform Commercial Code placed further impediments in the way of the cattlemen in their battle to obtain compensation, since lenders enjoyed priority over the cattlemen by virtue of secured interests in assets of the packer. The Senate Agriculture and Forestry committee was explicit in identifying as a target of the legislation the favored position that lenders enjoyed over cattlemen in thse situations:

> Of particular concern to the livestock producers...[in the case of American Beef Packers ("APB")] was the fact that ABP's principal source of financing, General Electric Acceptance Corporation, stood ahead of them among the bankrupt's creditors by virtue of its duly protected security interest in ABP's inventory, i.e., livestock and derivative products which the producers had sold on a cash basis and for which they had not been paid.
>
> Under present law, a packer is able to offer as security for a loan the livestock, meat, meat food products, or receivables or proceeds therefrom, which he has not paid for. The producer, who was responsible for rais-

> ing, feeding, and caring for the livestock is left unpaid, while secured creditors reap the reward of his labors . . .
>
> What is needed to prevent future producer tragedies, as occured following the ABP bankruptcy, is legislation that will afford a measure of protection to the livestock producer and feeder and yet not be so restrictive as to reduce competition in the livestock slaughtering business. H.R. 8410 accomplishes this dual objective.

S.Rep. No. 932, 94th Cong., 2d Sess. 5-6, *reprinted in* [1976] U.S.Code Cong. & Ad.News 2271, 2272.

As finally adopted by Congress, the 1976 amendments, Pub.L. No. 94-410, 90 Stat. 1251, create a comprehensive framework for the protection of the interests of livestock producers in their dealings with packers. The amendments empower the Secretary, after notice and hearing, to order an insolvent packer to cease purchasing livestock, allow the Secretary to seek temporary injunctions and restraining orders against packers, create a private right of action against packers for violation of the Act, require packers to make prompt payment for cash purchases, create a statutory trust for the benefit of unpaid cash sellers, and preempt certain provisioins of state law.

Although each of these protections help, to some degree, to ensure that the market for livestock will operate more equitably, it is the trust provision which was most squarely directed at the problem discussed in the Senate Report quoted above—that of secured creditors taking priority over cash sellers of livestock in the event of a packer bankruptcy. To make this clear, Congress included in the trust provision of the Act, § 206, the following statement of findings and intent:

It is hereby found that a burden on and obstruction to commerce in livestock is caused by financing arrangements under which packers encumber, give lenders security interest in, or place liens on, livestock purchased by packers in cash sales, or on inventories of or receivables or proceeds from meat, meat food products, or livestock products therefrom, when payment is not made for the livestock and that such arrangements are contrary to the public interest. This section is intended to remedy such burden on and obstruction to commerce in livestock and protect the public interest.

7 U.S.C.A. § 196(a) (West 1980).

[2] If any doubt is left regarding whether Congress intended § 206, the trust provision of the amendments to the Act, to give priority to the interests of cash sellers of livestock in packer inventories, accounts receivable, and proceeds derived from the cash seller's livestock over lenders who take security interests in these assets, we think that the following statement of the principal sponsor of the 1976 amendments to the Act, Rep. Thone, during the House debates lays any such doubt to rest:

> Why do we need this trust provision? Frankly, as I see it, this is central to the bill. Without the trust provision we have not really helped [farmers such as those injured by the American Beef Packers bankruptcy].
>
> What is the need for it, then? What are the arguments for the trust? First we have the simple answer of equitable treatment. How can one argue that a packer should be able to commit property as collateral for a loan, in this particular case livestock, for which he has not paid and does not actually own, to a third party, and then allow the third party to stand ahead of the producers if the packer fails?

> Again some would argue that by having the bond and the prompt pay and the solvency test, why do we need this trust provision? The answer is that *the trust provision will help prevent a packer from giving a priority to subsequent secured creditors, over the livestock producer who has not been paid.* The trust is the only provision here that gives any help to the farmer.

122 Cong.Rec. 12864 (May 6, 1976) (emphasis added).[9] In view of the foregoing, we believe that if a lender could defeat the § 206 trust merely by taking a security interest in inventories and receivables, the clear intention of Congress would be thwarted and the trust provision of the Act would be reduced to a nullity.[10]

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9 We think that this excerpt from the legislative history sufficiently answers the Bank's argument that the cash sellers should be estopped from invoking the trust because of their failure to avail themselves of other remedies provided for in the 1976 amendments. There is absolutely no support in the statute for such an argument. Furthermore, the remarks of Rep. Thone quoted above make it clear that the trust section is not dependent on other remedial provisions in the Act, but is the only provision in the amended Act which will ensure that unpaid cash livestock sellers receive full protection. Likewise, we find the Bank's other estoppel arguments—that the appellees "clothed Gotham with apparent ownership of the trust property," Brief of Appellant at 43, causing the Bank to rely on such a representation to its detriment, and that, as between the two "innocent" parties in this case, the appellees, rather than the Bank, must bear the loss since the appellees' acts occasioned the loss here—to be without basis in law or fact.

10 For this reason, we reject the Bank's argument that holders of secured interests in receivables stand in the same shoes as grocery stores who purchase the meat obtained by slaughtering the cash seller's livestock. The discussion above demonstrates the intent of Congress that the trust reach the former case; that the later case is outside the purview of the trust is demonstrated by the following excerpts from the House debates:

> Mr. BREGLAND. [D]id the committee intend the trust provisions under section 8 would extend to the meats or meat food products purchased and held by the retailers in a good faith transaction?

We hold that so long as cash sellers remain unpaid for their livestock sold to a packer subject to § 206, that packer must hold his inventories, acounts receivable and proceeds derived from cash sales for the benefit of the cash sellers until such time as they are fully paid. Where the packer has given a lender a security interest in inventories or receivables that are subject to the § 206 trust, the unpaid cash sellers have priority over those assets and may recover the proceeds of those receivables to the extent of the outstanding balance on the cash sales. In this case, the appellees are entitled to the collections of the receivables held in escrow, and the Bank must return to the appellees from the payments on the acocunts receivable which were applied to reduce the balance of the Bank's loan to Gotham the amount necessary to compensate the appellees in full for their cash sales to Gotham.

The Bank argues that the apellees must trace the particular accounts receivable derived from the sale of their livestock into the Bank's hands in order to recover. The Secretary of Agriculture, as *amicus curiae*, advances a different interpretation of the statute. The Secretary argues that no specific identification of the accounts receivable that cover the products of an individual cash seller was intended by Congress. The bankruptcy court below agreed with the Secretary, holding that the trust consisted of a floating pool of those assets derived from appellees' live

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Mr. THONE No. In those cases the trust would attach to the accounts receivable or proceeds received by the packer in exchange for such products.

122 Cong. Rec. 12867 (May 6, 1976). See Business Meetings on Packers and Stockyards Act of 1921, House Committee on Agriculture, 94th Cong. 2d Sess. (December 1976), pt. 62 (statement of Mr. Robert Bor, counsel to the committee, to the same effect).

stock as well as inventories, receivables and proceeds derived from other cash sellers' livestock. *In re Gotham Provision Co., Inc.*, 1 B.R. 255, 260-61 (Bkrtcy.S.D.Fla. 1979).

We conclude that the bankruptcy court was correct in rejecting the Bank's argument that specific tracing is required to establish that accounts receivable are subject to a § 206 trust. The language of the Act itself, §206(b), does not clearly answer this question. However, a review of the legislative history convinces us that Congress did not intend that livestock producers perform the almost impossible task of tracing their products into specific receivables.

The report of the Senate Committee on Agriculture and Forestry directly refutes the Bank's specific tracing argument. Discussing the § 206 trust, the Committee stated:

> Under this provision, *no specific identification of the livestock or the carcasses, meats, proceeds or receivables derived therefrom is required.* Instead, they are held in a pool in trust for the benefit of all unpaid cash sellers. Each cash seller would be entitled to a pro rata share in settlement of his acount.

S.Rep. No. 932, *supra* at 13, [1976] U.S.Code Cong. & Ad.News at 2279. (emphasis added). Further support for the notion that specific tracing is unnecessary and that the trust consists of a floating pool of inventories and receivables is found elsewhere in the legislative history. *See, e.g.*, Business Meetings of the House Committee on Agriculture, *supra*, at 63.[11]

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11 Our reference here is to the following exchange:

> Mr. DE LA GARZA. I would like to ask counsel if this trust is identifiable meat or volume of meat equal to that purchased.

We concede that the legislative history is not totally unambiguous on the issue of which inventories and receivables are subject to the §206 trust. However, due to the nature of the meat packing business where, once slaughtered, animal carcasses are quickly cut into meat products and commingled, it is a practical impossibility to identify which receivables correspond to which seller's livestock, whether that seller be an unpaid cash seller, a paid cash seller, or a credit seller. This problem was recognized in the House debates. Referring to the language of § 206(b),[12] Reps. Latta/ and Thone engaged in the following colloquy:

> Mr. LATTA...
> I would like to ask the gentleman whether or not he is referring in "All livestock purchased" to include livestock that may be paid for by the packer. Say he has livestock and say 50 percent of it has been paid for. Is the gentleman talking about "all" in the context of the livestock that has not been paid for?
>
> Mr. THONE. We are talking about "all" in the context of what has not been paid for. But as a practical matter what will occur is that a "floating trust" will exist to insure that unpaid livestock cash sellers are ultimately paid. It need not and should not prevent a packer from obtaining a loan on his livestock, meat products and accounts receivable for normally the amount of unpaid

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Mr. BOR. It was not the intent of the provision to require that the packer maintain custodial accounts separate for each livestock owner. It was not the intent that he try to identify separately the livestock which was purchased from each separate cattleman or livestock seller.

Rather, it was the intent that he would hold in a pool, so to speak, his accounts receivable and his meat products in trust for the benefit of all unpaid sellers.

12 *See* note 1, *supra*, for the test of § 206(b).

cash sellers outstanding at any one time should not be very great.

122 Cong.Rec. 12867 (May 6, 1976). The "floating trust" to which Rep. Thone refers here is not limited to assets which unpaid cash sellers can prove were derived from their products. To so construe the statute would effectively destroy the trust provision.

In the case at bar, the bankruptcy court found, based on testimony of a principal of Gotham and an officer of the Bank, that the meat products of cash and credit sellers had been commingled, and that the accounts receivable derived from producer cash sales could not be distinguished from those derived from credit sales. The Bank presented no evidence to establish which accounts may be free of the trust.

According to general principles of trust law, noted by the bankruptcy court below, where trust law, noted by the bankruptcy court below, where trust funds are commingled with funds not subject to the trust, a lien on the entire commingled fund with actual or constructive notice of the trust are subject to the lien. Scott, *The Law of Trusts*, §§ 219.4, 519.1 (3d ed. 1967). In this case, the Bank had constructive notice of the trust because a federal statute created the floating pool of commingled inventories of livestock products, e trust.

[3] We hold that where there is a commingling of livestock products such that it is impossible to determine whether a packer's inventories and accounts receivable have been derived from livestock purchased by the packer in a cash sale or credit sale, all of the packer's inventories, accounts receivable and proceeds attributable to livestock sales are

subject to the § 206 trust to the extent of the amount owed to the unpaid cash seller.[13] The only burden on the unpaid cash sellers in such a case is to prove the balance due to them and the existence of a floating pool of commingled inventories of livestock products, accounts receivables and proceeds derived from cash and credit livestock sales.[14] Since the appellees have carried this burden in this case, they are entitled to recover against the Bank the amount awarded by the bankruptcy court.

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13 We note that the bankruptcy court in *In re Frosty Morn Meats, Inc.*, No. BK-77-31707 (M.D.Tenn. Aug. 31, 1978), held the § 206 trust extended to all inventories, receivables and proceeds derived from cash sales of livestock, but would not extend to assets which could be identified as being derived from credit sales. Since the Bank introduced no evidence to identify any of the accounts receivable as being derived from credit sales, we need not decide the issue reached by the *Frosty Morn* court.

14 That this is the result intended by Congress is further revealed in the following excerpt from the Congressional Record which contains the responses by the Administrator of the Packers and Stockyards Administration of the Department of Agriculture to written questions submitted by Rep. Thone:

> 1. Section 8 of the bill impresses a trust on all "livestock purchased by a packer in cash sales and all inventories of or receivables or proceeds from meat, meat food products, or livestock derived therefrom" for the benefit of all unpaid cash sellers until full payment has been made. It was not intended by the Committee that any on-going segregation of funds (custodial account) would be required by this provision. Do you see any necessity for segregation of such current asets?
>
> Answer: No. There would be no need for any special segregation of such current assets, since under the bill the trust attaches on such livestock inventories, receivables and proceeds to the extent of the amount owed the unpaid cash sellers and there would be no necessity for a determination of the amount of that trust except in situations of the amount of that trust except in situations, such as bankruptcy, where the interests of various claimants must be specifically determined. The amount of the trust could be determined from the packer's records at any time by an audit. *Although the livestock, inventories, receivables and proceeds derived from the livestock purchased by the packer in cash sales would be commingled with all other assets in the normal operations of the business, such an audit would reveal the extent of the interest of the unpaid cash sellers in such commingled assets and therefore subject to the trust.*

III. PRESERVATION OF THE § 206 TRUST

The Bank agrues next that two appellees, Rogers and Perkins, did not preserve their rights by making the proper timely filing of notice with the Secretary of Agriculture. Both Rogers and Perkins made cash sales to Gotham on a "grade and yield" basis. The prices for 15 of Rogers' cattle and 16 of Perkins' cattle were determined on the following day, February 15, 1979. Plaintiff's Composite Exhibit No. 21. Under 7 U.S.C.A. § 228B (West 1980), the final dates by which Gotham was required to make payments on these

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3. The Committee intended that the trust established by section 8 be a constructive statutory trust arising by operation of law and that it need not specifically identify the livestock, accounts receivable, meat or meat products to which it attaches until the event (insolvency or bankruptcy) occurs which, as a result of its occurrence (marshalling of assets, etc.), results in the identification of certain assets to which it has attached.

As a practical matter, based on the experience of the Packers and Stockyards Administration, should such identification of assets to which the trust would attach, in the event of bankruptcy, cause any difficulty in the administration of this program as outlined above?

Answer: No. There should be no problem encountered in identifying the livestock, accounts receivable, and proceeds from the meat, meat food products, or livestock products subject to the trust for the unpaid cash sellers of the livestock. Under section 401 of the Packers and Stockyards Act, every packer is required to keep such accounts, records and memoranda as fully and correctly disclosed all transactions involved in his business. Insofar as we are aware, every packer keeps books and records from which the amount of the inventories, receivables and proceeds and the amount owed to each unpaid cash seller of the livestock to the packer can be determined by an audit of those books and records. *Upon bankruptcy, for example, an audit would reveal the amount of the commingled inventories, accounts receivable and proceeds, the amount owed to the unpaid cash sellers of livestock to the packer and thus the extent of the application of the trust. The audit would reveal the amount which must be paid to the unpaid cash sellers before the commingled inventories, accounts receivable, and proceeds are freed from the trust.* Accordingly, we forsee no problem in the administration of this program as contemplated by the Committee.

122 Cong.Rec. 18825 (June 17, 1976) (emphasis added).

cattle were February 15 and 16, 1979, and the 30-day periods following these dates ended on March 17 and 18, 1979. It is not disputed that both Rogers and Perkins gave timely notice to Gotham. The notice that Rogers filed with the Secretary bears a stamp "Received March 19, 2979," and Perkins' notice bore a "Received March 23, 1979" stamp. Plaintiff's Composite Exhibit No. 22. The bankruptcy court held that each cash seller "filed sufficient notice with the Debtor and with the Secretary within the time periods prescribed by § 206." *In re Gotham Provision Co., Inc.* 1 B.R. at 259. The district court affirmed, holding that because Gotham received written notice and the Secretary received actual notice within the required 30-day period, the trust was preserved.

Section 206(b) establishes a notice requirement for unpaid cash sellers who wish to invoke the § 206 trust. Section 206(b) provides, in pertinent part:

> *Provided,* That the unpaid seller shall lose the benefit of such trust if, in the event that a payment instrument has not been received, within thirty days of the final date for making a payment under section 228b of this title, or within fifteen business days after the seller has received notice that the payment instrument promptly presented for payment has been dishonored, the seller has not preserved his trust under this subsection. The trust shall be preserved by giving written notice to the packer and by filing such notice with the Secretary.

In cases such as the one at bar where the unpaid cash sellers have not received any payment instrument, the statute requires that unpaid cash sellers give written notice to the debtor packer and file that notice with the Secretary. Both the notice to the packer and the filing with the Secretary must be performed within the 30-

day period following the final date for making payment under § 409, 7 U.S.C.A § 228b (West 1980) in order to preserve the trust.[15]

[4] Appellees Rogers and Perkins and the Secretary of Agriculture as *amicus curiae* argue that the statutory requirement for filing is satisfied if the Secretary has actual notice of the intent of the cash sellers to invoke the § 206 trust within the requisite 30-day period. Here there is evidence that the Secretary had such notice, since officials of the Department of Agriculture personally notified the cash sellers of Gotham's bankruptcy petition.

We reject the argument that actual notice to the Secretary of the type found in this case is sufficient to preserve the trust under § 206. This argument is facially inconsistent with the language of the statute, which requires an unpaid cash seller to *file* notice with the Secretary rather than to give notice. Furthermore, the legislative history is explicit in rejecting the proposition that notice given by the Secretary to livestock producers of the bankruptcy of a packer satisfies the filing requirement of the statute. The Senate Report states:

> The Committee further believes that is would be most beneficial if the Secretary, through the Packers and Stockyards Administration, would formulate some means of notifying producers of a packer bankruptcy. *This notification would not affect the time periods established in section 8 [of the Bill, § 206 of the Act], for an unpaid seller to notify the packer and the Secretary in order to preserve his right to the trust.* Such notifica-

15 See 9 C.F.R. § 203.15 (1981) for the regulations which correspond to the notice provision of the statute.

> tion should spur unpaid cash sellers to file their notices, and thereby preserve their right to the trust, while also allowing more rapid determination of the scope of the bankrupt packer's estate.

S.Rep. 932, *supra*, at 13, [1976] U.S.Code Cong. & Ad.News at 2279 (emphasis added).[16]

As noted above, the notice which appellee Rogers Farms, Inc. filed with the Secretary was marked "Received March 19, 1979," thirty-one and thirty-two days after the final dates for making payment for its cattle sold in the two groups of sales, respectively. The statutory deadlines for filing notice with the Secretary, however, occurred on Saturday, March 17, 1979 and Sunday, March 18, 1979. Therefore, we now turn to the question of whether a filing on Monday, March 19, 1979, would be timely because the filing periods ended on a weekend.

[5] Rule 6(a) of the Federal Rules of Civil Procedure sets forth the basic rules for computing time periods in connection with proceedings in federal court. Rule 6(a) provides, in pertinent part:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated

16 The Secretary cites two Miller Act cases, *United States v. H. I. Lewis Construction Co.*, 375 F.2d 194, 199-201 (2d Cir. 1967) and *United States for the Use of Greenwald-Supon v. Gramercy Contractors, Inc.*, 433 F.Supp. 156 (S.D.N.Y. 1977), for the proposition that remedial statutes should be liberally construed, in order to effectuate congressional intent, to allow timely actual notice to satisfy statutory notice requirements. While we agree that this statute is remedial in nature, we would be forced to ignore clearly stated congressional intent in order to accept the actual notice standard advanced by the Secretary. This we decline to do.

period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

There is some dispute as to whether Rule 6(a) applies directly to federal statutes of limitations or whether it may be invoked only by analogy. *Compare 2 Moore's Federal Practice P. 6.06*[2] (2d ed. 1981) (taking the position that Rule 6(a) cannot expressly apply to a statute of limitation) with Wright & Miller, *Federal Practice and Procedure*, §1163 (1969) (noting that the majority rule is that Rule 6 is applicable to statutes of limitations). We need not explore the subtleties of this debate, because as we stated in *Lawson v. Conyers Chrysler, Plymouth and Dodge trucks, Inc.*, 600 F.2d 465, 466 (5th Cir. 1979), "[t]his court has consistently used Rule 6(a)'s method for computing federal statutory time limitations." Although the *Lawson* case involved the issue of whether the day on which an act was performed should be counted in connection with the time limitations in the Truth in Lending Act, each of the cases cited by the *Lawson* court to support the above quoted statement, *J. Aron & Co. v. S/S Olga Jacob*, 527 F.2d 416, 417 (5th Cir. 1976), *Wilkes v. United States*, 192 F.2d 128, 129 (5th Cir. 1951) and *Rimmer v. United States*, 172 F.2d 954, 958-59 (5th Cir. 1949), applied the method of Rule 6(a) for computing statutory time periods when the last day of the period occurs on a Saturday, Sunday or holiday and held that actions performed on the next business day were timely under the statutes involved.[17]

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17 Although other courts have applied the method of Rule 6(a) to time limits imposed by remedial statutes such as Title VII, *see, e.g., Pearson v. Furnco Construction Co.*, 563 F.2d 815, 818-19 (7th Cir. 1977); *Kane v. Douglas Elliman, Hollyday & Ives*, F.2d 141 (2d Cir. 1980), the district court in

We see no reason why the method of Rule 6(a) should not be invoked for purposes of computing the 30-day notice and filing period prescribed by §206 of the Packers and Stockyards Act. The justifications offered by the Supreme Court in *Union National Bank v. Lamb*, 337 U.S. 38, 41, 69 S.Ct. 911, 912, 93 L.Ed. 1190 (1949), for applying the method of Rule 6(a) in connection with 28 U.S.C. § 2101(c) (1948) have equal force here: "[s]ince the rule had the concurrence of Congress, and since no contrary policy is expressed in Rule 6(a) are equally applicable... [to the statutory time period involved here]." Moreover, the Packers and Stockyards Act is a remedial statute. Therefore, as we noted in connection with the Truth In Lending Act, the application of "Rule 6(a) is particularly appropriate in light of the remedial purposes of the Act." *Lawson v. Conyers Chrysler, Plymouth and Dodge Tructs, Inc.*, 600 F.2d at 466.

Applying the mehtod or Rule 6(a) to the facts of this case, we hold that the statutory period for preserving the § 206 trust for appellees Rogers and Perkins ended on Monday, March 19, 1979. Since there is no dispute that Rogers gave written notice to Gotham and filed with the Secretary no later than March 19, Rogers preserved its right to the § 206 trust.

The USDA stamped Perkins' notice as "received" on March 23, 1979. Both Perkins and the Secretary contend

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Smith v. Bailor, 22 FEP Cases 1378 (N.D.Ga. 1980), declined to apply Rule 6(a) to the 30-day period for filing suit against the federal government under 42 U.S.C. § 2000e-16. We recognize that the *Smith* case is inconsistent with the rule set forth above. However, the underlying rationale of *Smith*, that the Title VII time period involved was jurisdictional (and, therefore, in the view of the *Smith* court, not subject to extension under Rule 6(a)) is questionable in view of the *en banc* opinion of this court in *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981).

that filing does not occur when the USDA stamps the notice "received," but is effective when notice is transmitted to the Secretary. The bankruptcy court did not address this issue and made no findings of fact as to when Perkins' notice to the secretary was mailed or received.

[6] Although the stamp applied by the Secretary to the notice papers is conclusive evidence that filing occured no later than the date of the stamp, it is not conclusive evidence that the notice was not received in the Secretary's office at an earlier date.[18]

In a case where there was some delay in affixing the stamp "received" on the notice, the date of receipt would certainly be a more appropriate measure of filing.[19] We are convinced, therefore, that filing is effective no later than the time written notice is actually received in the USDA offices. However, in view of the absence of findings of fact relating to the date that Perkins' notice was transmitted and the date it was received in the USDA office, and in view of the inadequate development in this litigation of the issue of what constitutes filing, we decline to decide whether the filing required by § 206(b) occurs when notice is transmitted to the Secretary. We therefore remand Perkins' case for further proceedings.

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18 There is no doubt that whatever acts are required to make a filing under § 206, Rogers filed notice no later than march 19, 1979, and Perkins filed no later than March 23, 1979. Since there are no findings of fact on the issues of when notice to the Secretary was sent or received in Perkins's case, it is not established that one or both of these events did not occur by March 19. We believe that it is inappropriate to reach the issue of whether transmittal of written notice to the Secretary by mail or otherwise would constitute filing until these factual issues are answered.

19 The court in *Hedrick v. S. Bonaccurso & Sons, Inc.*, 466 F.Supp. at 1032, did not address this issue, but assumed that filing occurred on the date stamped.

[7] The Bank raises one further claim, that Rogers Farms, Inc. was not a proper party to file a claim under § 206, since Gotham had purchased its cattle from Billie Rogers Farm, an unincorporated separate entity. The bankruptcy court found that Billie Rogers Farm had assigned all of its accounts receivable to Rogers Farms, Inc., and held that the assignee could perfect a claim under § 206. The court further noted that there was no showing that this assignment was prejudicial to Gotham or to the Bank. We agree with the bankruptcy court that Rogers Farms, Inc. is entitled to the protection of § 206 with respect to the cattle for which it remains unpaid.

IV. CONCLUSION

The bankruptcy court's decision, affirmed by the district court, properly held that the appellees were cash sellers within the meaning of § 206 of the Packers and Stockyards Act, and that those cash sellers who had properly preserved the § 206 trust were entitled to recover the unpaid balance on their sales of livestock from the trust assets, both those held in escrow and those in the hands of the Bank. The bankruptcy court did not make sufficient findings to determine whether appellee Perkins preserved his rights to the § 206 trust, and therefore the judgments below with respect to Perkins are reversed and the case is remanded. All other appellees have properly preserved the § 206 trust, and the judgments as to those parties are affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

In re GOTHAM PROVISION COMPANY, INC.,
Debtor/Debtor in Possession.

THE FIRST STATE BANK OF MIAMI,
Plaintiff,

v.

GOTHAM PROVISION COMPANY, INC., et al.,
Defendants.

United States District Court
Southern District of Florida

Case No. 79-247-BK-JAG-W

This is an appeal from the Findings of Fact, Conclusions of Law, and Final Judgment entered October 26, 1979, by the Honorable Sidney M. Weaver, Bankruptcy Judge, concerning the accounts receivable of Gotham Provision Co. Inc., a bankrupt meat packer.

On March 9, 1979, Gotham Provision filed a petition in bankruptcy pursuant to Chapter XI of the Bankruptcy Act.

Appellant, The First State Bank of Miami, a Gotham creditor secured by an interest in Gotham's accounts receivables, thereupon instituted an adversary proceeding by filing a complaint to establish the priority and validity of its lien on said accounts receivable. Gotham and certain livestock sellers, the appellees herein, were named as defendants. The livestock sellers had provided the bankrupt with livestock, had not received payment, and therefore asserted their prior entitlement to the accounts receivable based on federal statute.

The Bankruptcy Court found that a priority existed in favor of the livestock sellers pursuant to a statutory trust created by the Packers and Stockyard Act of 1921, as amended, 7 U.S.C. §181 et seq. It is from that decision that The First State Bank of Miami brings this appeal. Oral argument was heard on June 13, 1980.

Section 206 of the Packers and Stockyard Act of 1921, 7 U.S.C. §196, provides in pertinent part as follows:

> All livestock purchased by packers in cash sales, and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, shall be held by such packer in trust for the benefit of all unpaid sellers... Provided, That the unpaid seller shall lose the benefit of such trust if, in the event that a payment instrument has not been received, within thirty days of the final date for making a payment under section 228b of this title, or within fifteen business days after the seller has received notice that the payment instrument promptly presented for payment has been dishonored, the seller has not preserved his trust under this subsection. The trust shall be preserved by giving written notice to the packer and by filing such notice with the Secretary.

Appellant-bank presents four questions for this Court's consideration. The first of these is whether the transactions between the livestock sellers and the bankrupt packers were cash sales entitling the sellers to the benefit of the Act. (There is no real dispute that Gotham is a packer to whom the Act is directed. See §206(b).)

Appellant maintains that §206 of the Act has no application to this case unless the transactions were "cash sales." Words in statutes, appellant argues, "should be interpreted where possible in their ordinary, everyday senses." See *Crane v. Commissioner*, 331 U.S. 1, 6 (1947). According to appellant, the plain meaning of "cash sale" is

"a sale conditioned on payment concurrent." Black's Law Dictionary 272 (4th rev. ed. 1968). In this case, appellant argues, the payment was not concurrent.

The facts adduced at trial show that the packer often was as much as two or three weeks delinquent in paying for livestock.

Appellant contends that the lengthy delays between delivery of the cattle and payment is illustrative of a course of conduct constituting an extension of credit. Appellant therefore reasons that the transactions were credit sales not subject to the Act.

Section 206 (c), 7 U.S.C. §196(c), provides, however, "For the purpose of this section a cash sale means a sale in which the seller does not expressly extend credit to the buyer."

Section 409 of the Act, 7 U.S.C. §228b, indicates that credit should be extended in writing. It requires a packer to make payment prior to the close of the next business day following the purchase and delivery of livestock unless an agreement providing to the contrary is executed in writing prior to the sale and disclosed in the purchaser's records.

Furthermore, 9 C.F.R §201.200 mandates that a credit agreement appear in a written form specifically stating that the livestock seller waives his right to section 206 protection.

The livestock sellers in this case did not execute such waivers.

Appellant contends that one livestock seller extended credit way of a letter dated September 26, 1978. The letter signed by appellee Roberts does not state that credit is extended but merely allows payment and mailing of checks "as in the past." A writing that does not conform to the

regulations of 9 C.F.R. §201.200 does not waive the trust provisions. See *Hedrick v. S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1025 (E.D. Pa. 1978).

Read together, the statute and regulations require that an extension of credit be express and written in a manner so as to explicitly waive the right to the statutory trust provision. Appellant's argument that the course of conduct amounted to an extension of credit making the statute inapplicable cannot be reconciled with the statute and regulations. See *In re R&D Investments, Inc.* 35 Agricultural Decisions 668 (1976); *In re Penn Packing Company*, 36 Agricultural Decisions 1857 (1977).

The Bankruptcy Court's finding that the course of conduct of lthe livestock sellers does not constitute an extension of credit, and that the transactions in question are cash sales within the meaning of the Act is hereby Affirmed.

The second issue raised by appellant is whether the proceeds of the accounts receivable have been sufficiently traced and identified as funds to which the seller's priority attaches.

Appellant-bank maintains that the livestock sellers have not demonstrated that any of the monies received by the Bank in repayment of its loan to Gotham were subject to the statutory trust.

The Bankruptcy Court held that the appellees were required to demonstrate the existence of a floating pool of commingled funds in an amount larger than their interest. The floating pool would include the inventory, accounts receivable, and proceeds from livestock purchased from the appellees on or after February 12, 1979, (the earliest sale date involved herein) and the inventory, receivables and

proceeds on hand as of February 12, 1979, which were derived from livestock purchased in cash sales.

Additionally, the Bankruptcy Court found that the appellees met this burden and that the escrow funds and monies used by the Bank to decrease the principal amount of the debtor's loan were a part of this floating pool.

This conclusion is supported by the facts and figures introduced at trial. Since spring of 1978 the daily balance of the outstanding loan from the Bank to Gotham was $450,000.00. This was the figure shown on February 28, 1979, but the amount was reduced to $333,700.00 on March 9, 1979, and to $112,324.19 on March 19, 1979. At this point, a special escrow account was established by Court Order for the deposit of future collections of accounts receivable. Therefore, more than $335,000.00 was received and used by the Bank to reduce the loan balance. This amount exceeds the figure which was claimed by the livestock sellers — approximately $260,000.00.

The amount used decrease the outstanding loan balance was subject the section 206 trust, and hence subject to the appellee's claims.

Appellant argues that the funds used to decrease the loan balance were derived from credit purchases not subject to the trust as well as from the sale of livestock received from the appellees. It is not the burden of the individual appellees, however, to specifically trace their livestock into inventory and receivables. See *In re Frosty Morn Meats, Inc.*, Case No. BK 77-31707 (Bankr. Ct. M.D. Tenn. Aug. 31, 1978).

Basic trust principles provide that when trust property is commingled with non-trust property, the trust fund beneficiaries have a lien on the commingled fund.

The Bankruptcy Court's finding that the funds were adequately traced and identified is likewise hereby Affirmed.

The third question presented to this Court is whether the claims of appellees Perkins and Robers Farm, Inc. were timely filed. *Because the debtor received timely written notice of the claims and the Secretary received actual notice within the prescribed time frame* the Court *finds that the claims were properly filed.* The assignment of claims between Billie Rogers Farm and Rogers Farm, Inc. was not prejudicial and does not affect this Court's opinion as to whether the claim was filed properly.

The fourth issue raised is whether the sellers should be estopped from asserting their priority against the Bank because of their failure to promptly demand payment. Because the claims were filed within the time permitted by statute, the Court finds no merit in this argument. Sellers fall within the statutory language of §206 an appellant has failed to show why the satute should not be applied.

It is thereupon

ORDERED AND ADJUDGED that the Findings of Fact, Conclusions of Law, and Final Judgment of the Bankruptcy Court be and the same are hereby AFFIRMED.

DONE AND ORDERED at Fort Lauderdale, Florida, 30th day of July, 1980.

/s/ JOSE A. GONZALEZ, JR.
Jose A. Gonzalez, Jr.
United States District Judge

cc: all counsel

In re GOTHAM PROVISION COMPANY, INC.,
Debtor/Debtor in Possession.

THE FIRST STATE BANK OF MIAMI,
etc.,
Plaintiff,

vs.

GOTHAM PROVISION COMPANY, INC., etc., et al.,
Defendants.

United States District Court
Southern District of Florida

Case No. 79-247-BK-JAG-W

THIS CAUSE having come on to be heard upon Plaintiff's Complaint to Establish Validity, Priority and the Extent of Lien and the Counterclaims and Crossclaims of the Defendants, and the Court, having heard the testimony and examined the evidence presented, having observed the candor and demeanor of the witnesses, having considered the arguments of counsel, and being otherwise fully advised in the premises, does hereby make the following findings of fact and conclusions of law:

This Court has jurisdiction of the parties and the subject matter.

Plaintiff, The First State Bank of Miami (the "Bank"), is a Florida banking corporation with its principal place of business in Dade County, Florida. The Defendant, Gotham Provision Company, Inc. (the "Debtor"), is a debtor under Chapter XI of the Bankruptcy Act continued in possession and is a Florida corporation with its principal place of business in Dade County. The remaining Defendants are

individuals and corporations located throughout the State of Florida and engaged in the business of selling livestock.

This proceeding presents the conflicting claims by a bank claiming under a security agreement and by livestock sellers claiming under a federal statute to funds which represent the collections of accounts receivable of the Debtor which arose from the sale of meat products. This Court concludes that the livestock sellers are entitled to prevail.

Prior to the filing of its Chapter XI petition on March 9, 1979, the Debtor was engaged in the business of buying livestock for the purposes of slaughtering livestock and manufacturing and marketing meats and livestock products. On November 9, 1976, the Debtor and the bank entered into a financing arrangement, duly perfected, under which the Bank would advance money to the Debtor with such advances to be secured by a lien on the Debtor's interest in its inventory and accounts receivable and the proceeds thereof. During the calendar year 1978, the Debtor began experiencing some financial difficulties, of which the Bank was aware, and these difficulties finally culminated in the filing of a Chapter XI petition by the Debtor on March 9, 1979. During the period of time from the end of February through March 16, 1979, the Debtor made substantial deposits in an account at the Bank which deposits were used to lower the Bank's loan balance from $450,000.00 to $112,324.19. Thereafter, at the request of the United States Department of Agriculture, this Court directed the Debtor to deposit future collections of accounts receivable in an escrow account at the Bank, and these funds totalled $74,439.85 as of the time of trial.

On April 20, 1979, the Bank instituted this adversary proceeding to determine the validity, priority and extent of its lien on the escrow fund. It joined as defendants the

Debtor as well as D. R. Kilpatrick ("Kilpatrick"), Lykes Brothers, Inc. ("Lykes"), Ronnie Perkins ("Perkins"), W. D. Roberts ("Roberts"), Billie Rodgers Farm ("Rodgers"), United States Sugar Corporation ("U.S. Sugar"), W & D Dairy, Robbie Addison and W. Garcia. (Since W & D Dairy and W. Garcia failed to appear at the trial and prove their claims, they will not be considered further.) The Debtor filed an Answer admitting the allegations of the Bank's Complaint except to state that it was without knowledge of the relative priority of the other defendants vis a vis the Bank with respect to the escrow fund. The other defendants (the "livestock sellers") answered the Complaint alleging their priority interest to the escrow fund and further counterclaiming and crossclaiming against the Bank and the Debtor seeking recovery of the funds deposited with the Bank and used by the bank to lower the loan balance. The amounts of their claims are:

Kilpatrick	$121,431.39
Lykes	29,002.48
Perkins	10,000.27
Roberts	15,279.00
Rodgers	47,689.00
U.S. Sugar	34,880.63
Addison	1,560.00
Total	$259,842.77

Under the Uniform Commercial Code, the Bank arguably would be entitled to keep all of the collected accounts receivable (at least those collected and deposited at the Bank prior to the filing of the Chapter XI petition on March 9, 1979), if the rationale of *DuBay v. Williams*, 417 F.2d 1277 (9th Cir. 1966) is followed. In *DuBay*, the Court held that a creditor secured by a floating lien on accounts receivable was not subject to preference attack with respect to the accounts receivable generated within four months of

bankruptcy. Here, however, the Debtor in Possession (with the same powers as a bankruptcy trustee) has not sought to avoid the transfers on the basis of §60 of the Bankruptcy Act, so there is no need to decide that issue. But, assuming that the Bank's security interest is valid and enforceable, the Bank still cannot prevail.

The livestock sellers base their claim to the funds held by the Bank on §206 of the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. §196:*

> (a) It is hereby found that a burden on and obstruction to commerce in livestock is caused by financing arrangements under which packers encumber, give lenders security interest in, or place liens on, livestock purchased by packers in cash sales, or on inventories of or receivables or proceeds from meat, meat food products, or livestock products therefrom, when payment is not made for the livestock and that such arrangements are contrary to the public interest. This section is intended to remedy such burden on and obstruction to commerce in livestock and protect the public interest.
>
> (b) All livestock purchased by a packer in cash sales, and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, shall be held by such packer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers: *Provided*, That any packer whose average annual purchases do not exceed $500,000 will be exempt from the provisions of this section. Payment shall not be considered to have been made if the seller receives a payment instrument which is dishonored: *Provided*, That the unpaid seller shall lose the benefit of

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* Lykes also has asserted a reclamation claim under either §672.702(2) or §672.507(2), Florida Statutes. While the Court finds that Lykes proved the factual elements of a right under those sections, the Court does not decide the legal issues of whether Lykes could prevail over the Bank and the Debtor, since it is not necessary to do so in light of this Court's ruling on the §206 claim.

such trust if, in the event that a payment instrument has not been received, within thirty days of the final date for making a payment under section 409, or within fifteen business days after the seller has received notice that the payment has been dishonored, the seller has not preserved his trust under this subsection. The trust shall be preserved by giving written notice to the packer and by filing such notice with the Secretary.

(c) For the purpose of this section, a cash sale means a sale in which the seller does not expressly extend credit to the buyer.

Section 206 was enacted as part of Public Law 94-410 and became law on September 13, 1976. The operative elements of the statute are in subsection (b): The buyer must be a packer as defined in the statute and must be purchasing livestock in cash sales. This packer must have average annual purchases in excess of $500,000.00 and any unpaid cash seller seeking the benefits of the statute must give written notice to the packer and file the notice with the Department of Agriculture within thirty days of the final date for making payment under §409 of the Packers and Stockyards Act.:

Section 206 and the other amendments to the Packers and Stockyards Act enacted in 1976 showed Congress' recognition of and reaction to the perilous position of livestock producers and sellers, who often sell an entire year's production at one time. See the legislative history in (1976) U.S. Code Congressional and Administrative News 2267. It is clear from the legislative history that the enactment of §206 was intended specifically to prevent recurrence of the horrendous losses suffered by livestock sellers in the bankruptcy of American Beef Packers caused by the existence of a lending institution's liens on inventory, accounts receivable, and proceeds. It is equally clear from §206(a) that the situation presented by this proceeding is the

factual pattern anticipated by Congress, and the only way the Bank could prevail is if this Court would do what it will not do — ignore the clear legislative intent and unequivocal language of §206. As the court stated in *In re Frosty Morn Meants, Inc.*, Case No. Bk 77-31707 (Bankr.Ct. M.D.Tenn. Aug 31, 1978):

> The language of (§206) together with its legislative history shows that what Congress had in mind in its enactment was (1) to establish a statutory trust in livestock purchased by a packer in cash sales, and inventories of, or receivables or proceeds derived therefrom, for the benefit of unpaid cash sellers until they had received payment in full; (2) to deny priority to a secured lender holding livestock, meat, meat food products, or receivables or proceeds therefrom, purchased by a packer in cash sales but which had not been paid for; (3) to eliminate specific identification of the livestock, carcasses, proceeds or receivables, but instead establish a trust pool for the benefit of the unpaid cash sellers, and (4) to pre-empt State laws in conflict therewith.

See also In re Federal Packing Company of Florida, Case No. 78-1492 Bk CA-B, Adv. No. 1 (Bankr.Ct. S.D.Fla. April 23, 1979).

There has been no real dispute, and this Court finds, that the Debtor is a packer as defined by the Act and that its average annual purchases did exceed well over $500,000.00. In all instances save one there is no dispute that the product sold by the livestock sellers was indeed livestock; the Bank has asserted that Lykes sold meat products rather than livestock, but the evidence is clear and this Court so finds, that Lykes sold livestock to the Debtor (although it had a custom slaughter arrangement with the Debtor as well). This Court further finds that each of the livestock sellers filed sufficient notice with the Debtor and with the Secretary of Agriculture within the time periods prescribed by §206 and established that the amounts due to each are the

amounts claimed, set forth above.

The real issues in this adversary proceeding have been whether the sales of livestock upon which the livestock sellers are basing their claims are cash sales within the meaning of §206(c) and to what extent the livestock sellers are required to trace their livestock to the ultimate point of collection of accounts receivable if they are to recover against the Debtor and the Bank. For the reasons discussed below, this Court concludes that all sales at issue in this adversary proceeding were cash sales and that the extent of tracing required of the livestock sellers is minimal and has been more than met.

The Bank has urged that the sales by the livestock sellers to the Debtor were on credit and thus are not entitled to the protection afforded to those who sell in cash sales. The gist of the argument is that the livestock sellers acquiesced in a course of conduct which amounted to an extension of credit by the livestock sellers or are estopped by their course of conduct from claiming that the sales of livestock were cash sales. The facts are undisputed that the livestock sellers — with the exception of Addison, whose dealings with the Debtor were few and far between — sold livestock to the Debtor more or less on a regular basis and that the Debtor rarely, if ever, complied with the prompt payment provisions of §409 of the Act, 7 U.S.C. §228b. However, the Court finds that the checks sent to the livestock sellers were not unreasonably late, with the possible exception of an isolated incident involving Kilpatrick, discussed below, which the Court finds is not dispositive of the issue. Moreover, there is no evidence that any of the livestock sellers — with the possible exception of Roberts — ever extended, orally or in writing, credit to the Debtor. The statute, in §206(c), requires an express extension of credit if the sale is to be considered other than a cash sale, and this court further holds, as a matter of fact and of law,

that the course of conduct of these livestock sellers did not amount to an extension of credit, let alone an express extension of credit. *See Fillippo v. S. Bonaccurso & Sons, Inc.*, 466 F.Supp. 1008 (S.D.Pa. 1978); *Hedrick v. S. Bonaccurso & Sons, Inc.*, 466 F.Supp. 1025 (E.D.Pa. 1978). The Bank urges that Kilpatrick expressly extended credit in connection with one sale that occurred in the Fall of 1978. Whether Kilpatrick did so is irrelevant, because the evidence is clear that Kilpatrick did not extend credit for those sales involved herein and because the Fall, 1978 sale was an unusual transaction, thus not even within the scope of the Bank's "course of conduct" argument.

The Bank also argues that Roberts extended credit not only by his course of conduct but also by signing a letter dated September 26, 1978, the text of which reads:

> On this date, I am entering into an agreement with Gotham Provision Company, Inc., authorizing them to pay for and mail checks in payment for cattle purchased from us as they have done in the past. This pertains to section 206 of the packers and stockyards regulations.

The most obvious defect in the Bank's argument is that the Roberts document states nothing about extending credit, only about paying for cattle and mailing checks "as in the past." Since the course of conduct did not amount to an extension of credit, explicitly agreeing to the course of conduct should not constitute an extension of credit. Additionally, the writing does not comply with the United States Department of Agriculture's regulation governing the extension of credit in livestock sales, 9 C.F.R. §201.200. This regulation requires clear language for an extension of credit and further requires that it be in writing and state that the livestock seller recognizes that he is waiving his rights under §206. This Court finds that the writing signed by Roberts does not meet any of the minimal requirements of

the regulation. Since this Court holds that the regulation is a statement of substantive law, a non-conforming writing cannot constitute an extension of credit. *See Hedrick v. S. Bonaccurso & Sons, Inc.*, 466 F.Supp. 1025 (S.D.Pa. 1978); *In re Frosty Morn Meats, Inc.*, Case No. Bk 77-31707 (Bankr.Ct. M.D.Tenn. Sept. 14, 1978). Of course, this holding is an additional reason why the other livestock sellers cannot be considered to have extended credit to the Debtor in connection with the sales involved herein (or any other sales).

A principal of the Debtor, Helen Fischelmayer, testified that the sales involved herein were credit sales. However, her further testimony shows that her understanding of cash sale is not that set forth in the legislative history; rather, Mrs. Fischelmayer equated cash sales with C.O.D. sales. Of course, when the sales were made on a "grade and yield" basis (the grade and yield of meat realized from the livestock after their slaughter), it would be impossible to have C.O.D. sales. the Court also notes that Mrs. Fischelmayer has an interest in assisting the Bank, since she and her husband are liable to the Bank on personal guarantees of the Debtor's obligations to the Bank. This Court rejects her testimony that the sales were not cash sales.

Accordingly, this Court finds that the sales involved herein were cash sales within the meaning of §206 and that the defendant livestock sellers are not estopped from asserting their positions as unpaid cash sellers. (The Bank raised other defenses to the livestock sellers' counterclaims, but those defenses are without merit in fact and in law.)

This contest between the Bank and the livestock sellers squarely presents the issue of what extent of tracing is required for the livestock sellers to prevail over the Bank. The testimony of Helen Fischelmayer was that the meat products derived from the livestock remain in identifiable

form — by means of tagging — until the carcasses are cut into pieces smaller than halves. Then, the meat is commingled with other meat already in inventory. Mrs. Fischelmayer stated that it would be impossible to identify what account was created by the sale of meat products derived from livestock sold by any particular livestock seller, by sellers who clearly extended credit to the Debtor, or by meat products purchased from another packer. Mr. Robert Randall, an officer of the Bank, testified that the Bank had made no effort to distinguish the accounts receivable ultimately derived from livestock sold by the defendant livestock sellers and the accounts receivable ultimately derived from livestock sold on credit. Since the Bank's security interest was only in the Debtor's interest in inventory and accounts receivable and since the Bank presented no evidence on this issue, the Bank has failed to establish what accounts receivable are free of the trust imposed by §206 and which are subject to it. Accordingly, it has not established a right to the proceeds of the accounts receivable with priority over the livestock sellers' rights.

Moreover, the evidence presented by the livestock sellers adequately traced the funds subject to the trust of §206. *See In re Frosty Morn Meats, Inc.*, Case No. Bk 77-31707 (Bankr.Ct. M.D.Tenn. Aug. 31, 1978); *In re Federal Packing Company of Florida*, Case No. 78-1492 Bk CA-B, Adv. No. 1 (Bankr.Ct. S.D.Fla. April 23, 1979). We adopt the tracing test urged by the United States Department of Agriculture: The trust beneficiaries' sole burden is to show that there existed a floating pool of commingled funds exceeding in dollar amount their total trust interests, and the floating pool includes not only the inventories of, or receivables or proceeds from meat, meat food products or livestock products derived from livestock purchased from the defendant livestock sellers on or after February 12, 1979 (the date of the earliest sale involved herein), but also includes inventories, receivables and proceeds on hand as of

February 12, 1979, which had been derived from livestock purchased in cash sales. This Court finds that the escrow fund and the amounts used by the Bank to decrease the principal amount of the Debtor's loan are a part of that floating pool.

Even if a more stringent standard of tracing is applicable, the livestock sellers have met it. This Court finds from the evidence that the livestock sold by the defendant livestock sellers augmented the inventory by a much greater extent than livestock sold on credit and meat products purchased from packers, that the sales of inventory increased the amounts of accounts receivable, and that the collections of accounts receivable were deposited at the Bank, which used the deposits to lower its outstanding loan balance from $450,000.00 on February 28, 1979 — which was the daily balance on every day since the Spring of 1978 except for several days during the Christmas and New Years holidays in December of 1978 and January 1979. On March 9, 1979, the loan balance was $333,700.00, and on March 19, 1979, the balance was $112,324.19. Thereafter, the collections of accounts receivable were deposited in the escrow account pursuant to this Court's order. Accordingly, it is clear that the Bank received and retained in excess of $335,000.00 of accounts receivable which were subject to the §206 trust.

Under general principles of trust law, a person with actual or constructive knowledge of a trust takes funds from the trustee subject to the beneficiaries' claims. Scott, *The Law of Trusts* §288 (3d ed. 1967). Here, the Bank had at least constructive knowledge of the trust, because the trust is created by federal statute. Furthermore, the Bank was aware that the Debtor was subject to regulation by the United States Department of Agriculture and did not make inquiry whether livestock sales were cash sales or on credit. Accordingly, even if the Bank did not have actual knowledge

of the terms of §206, it is bound by that statute.

Further principles of trust law provide that the commingling of trust funds with funds not subject to the trust results in a lien for the benefit of the beneficiaries on the commingled fund. This lien survives the transfer of the fund to a person, like the Bank, who has actual or constructive knowledge of the trust. Scott, *The Law of Trusts* §§291.4 and 519.1 (3d ed. 1967). Accordingly, the Bank is liable to the trust beneficiaries to the full extent of their claims. Of course, there is the additional $70,000.00 in the escrow account which is subject to the livestock sellers' claim as well.

One other minor issue was raised. The Bank has urged that Rodgers Farm, Inc. does not have a claim under §206 because the livestock involved were actually sold by a partnership or sole proprietorship called Billie Rodgers Farm. However, there was evidence presented that Billie Rodgers Farm had assigned all of its accounts receivable to Rodgers Farm, Inc. This Court sees no reason why a claim under §206 cannot be assigned nor why the assignee cannot perfect the claim. Furthermore, the Bank and the Debtor have made no showing that the assignment was prejudicial to either of them. Accordingly, this Court finds that Rodgers Farm, Inc. had a claim under §206 which it has duly perfected.

As mentioned above, two of the livestock sellers joined as defendants by the Bank, W & D Dairy and W. Garcia, failed to appear at the trial and present evidence of their claims. In addition, Waldrep Dairy, Inc., while technically not joined by the Bank, also filed an answer to the complaint and crossclaimed and counterclaimed against the Bank and the Debtor; however, Waldrep Dairy, Inc. failed to appear at the trial and present evidence. Accordingly, the Bank will prevail over their claims, and

their counterclaims and crossclaims will be dismissed with prejudice.

A judgment will be entered in accordance with these findings and conclusions.

DATED: This 26th day of October, 1979.

/s/ SIDNEY M. WEAVER
Sidney M. Weaver
Bankruptcy Judge

Copies furnished to:

Timothy J. Norris, Esquire
Earnest W. Dean, Jr., Esquire
R. Bruce Wallace, Jr., Esquire
Francis L. Carter, Esquire
Rogers Morris & Ziegler
Sandler & Sandler, P.A.
Papy, Duval & Poole
Don A. Lynn, Esquire
Eric Paul, Esquire

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-5682

IN RE: GOTHAM PROVISION COMPANY, INC.,
Debtor/Debtor in Possession,

THE FIRST STATE BANK OF MIAMI,
Appellant,

v.

GOTHAM PROVISION COMPANY, INC., ET AL.
Appellees.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

May 13, 1982

Before MORGAN, TJOFLAT, and ANDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above-entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON

R. Lanier Anderson
United States Circuit Judge A-53

7 U.S.C. §196. *Statutory trust established — Protection of public interest from inadequate financing arrangements.*

(a) It is hereby found that a burden on and obstruction to commerce in livestock is caused by financing arrangements under which packers encumber, give lenders security interest in, or place liens on, livestock purchased by packers in cash sales, or on inventories of or receivables or proceeds from meat, meat food products, or livestock products therefrom, when payment is not made for the livestock and that such arrangements are contrary to the public interest. This section is intended to remedy such burden on and obstruction to commerce in livestock and protect the public interest.

Livestock, inventories, receivables and proceeds held by packer in trust for benefit of unpaid cash sellers; time limitations; exempt packers; effect of dishonored instruments; preservation of trust benefits by seller.

(b) All livestock purchased by a packer in cash sales, and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, shall be held by such packer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers: *Provided,* That any packer whose average annual purchases do not exceed $500,000 will be exempt from the provisions of this section. Payment shall not be considered to have been made if the seller receives a payment instrument which is dishonored: *Provided,* That the unpaid seller shall lose the benefit of such trust if, in the event that a payment instrument has not been received, within thirty days of the final date for making a payment under section 228b of this title, or within fifteen

business days after the seller has received notice that the payment instrument promptly presented for payment has been dishonored, the seller has not preserved his trust under this subsection. The trust shall be preserved by giving written notice to the packer and by filing such notice with the Secretary.

Definition of Cash Sale

(c) For the purpose of this section, a cash sale means a sale in which the seller does not expressly extend credit to the buyer.

Aug. 15, 1921, c. 64, §206, as added Sept. 13, 1976, Pub.L. 94-410, §8, 90 Stat. 1251.

7 U.S.C. §204. **Bond and suspension of registrants.**

On and after July 12, 1943, the Secretary may require reasonable bonds from every market agency (as defined in sections 201 to 203 and 205 to 217a of this title), every packer (as defined in sections 191 to 196 of this title) in connection with its livestock purchasing operations (except that those packers whose average annual purchases do not exceed $500,000 will be exempt from the provisions of this paragraph), and every other person operating as a dealer (as defined in sections 201 to 203 and 205 to 217a of this title), under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction. If the Secretary finds any packer is insolvent, he may after notice and hearing issue an order under the provisions of section 193 of this title requiring such packer to cease and desist from purchasing

livestock while insolvent, or while insolvent purchasing livestock except under such conditions as the Secretary may prescribe to effectuate the purposes of the chapter.
As amended Sept. 13, 1976, Pub. L. 94-410, § §1, 4, 90 Stat. 1249.

7 U.S.C. §209. **Liability to individuals for violations; enforcement generally.**

(a) If any person subject to this chapter violates any of the provisions of this chapter, or of any order of the Secretary under this chapter, relating to the purchase, sale, or handling of livestock, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 210 of this title, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.
As amended Sept. 13, 1976, Pub.L. 94-410, § 6, 90 Stat. 1250.

7 U.S.C. §228a. **Authority of Secretary to request temporary injunction or restraining order.**

Whenever the Secretary has reason to believe that any person subject to this chapter (a) with respect to any transactions subject to this chapter, has failed to pay or is unable to pay for livestock, meats, meat food products, or livestock products in unmanufactured form, or has failed to remit to the person entitled thereto the net proceeds from the sale of any such commodity sold on a commission basis; or (b) has operated while insolvent, or otherwise in violation of this chapter in a manner whcih may reasonably be expected to cause irreparable damage to another person;

or (c) does not have the required bond; and that it would be in the public interest to enjoin such person from operating subject to this chapter or enjoin him from operating subject to this chapter except under such conditions as would protect vendors or consignors of such commodities or other affected persons, until a complaint under this chapter is issued and dismissed by the Secretary or until an order to cease and desist made thereon by the Secretary has become final and effective within the meaning of this chapter or is set aside on appellate review of the Secretary's order, the Secretary may notify the Attorney General, who may apply to the United States district court for the district in which such person has his principal place of business or in which he resides for a temporary injunction or restraining order. When needed to effectuate the purposes of this section, the court shall, upon a proper showing, issue a temporary injunction or restraining order, without bond. Attorneys employed by the Secretary of Agriculture may, with the approval of the Attorney General, appear in the United States district court representing the Secretary in any action seeking such a temporary restraining order or injunction. Aug. 15, 1921, c. 64, § 408, as added Sept. 13, 1976, Pub.L. 94-410, §5, 90 Stat. 1250.

Codification. Former section 228a transferred to section 396 of this title.

7 U.S.C. §228b. **Prompt payment for purchase of livestock — Full amount of purchase price required; methods of payment.**

(a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided,* That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and

transfer of possession thereof, actually deliver at the point of transfer of possession to the Seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further,* That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

Waiver of prompt payment by written agreement; disclosure requirements

(b) Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a) of this section. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

Delay in payment or attempt to delay deemed unfair practice.

(c) Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of

funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.
Aug. 15, 1921, c. 64, §409, as added Sept. 13, 1976, Pub.L. 94-410, §7, 90 Stat. 1250.

REGULATIONS

9 C.F.R. §201.200 **Sale of livestock to a packer on credit.**

(a) No packer whose average annual purchases of livestock exceed $500,000 shall purchase livestock on credit, and no dealer or market agency acting as an agent for such a packer shall purchase livestock on credit, unless: (1) Before purchasing such livestock the packer obtains from the seller a written acknowledgement as follows:

On this date I am entering into a written agreement for the sale of livestock on credit to _____, a packer, and I understand that in doing so I will have no rights under the trust provisions of section 206 of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 196, Pub. L. 94-410), with respect to any such credit sale. The written agreement for such selling on credit:

Covers a single sale.

Provides that it will remain in effect until (date).

Provides that it will remain in effect until canceled in writing by either party.

(Omit the provisions not applicable.)

Date _____

Signature _____.

(2) such packer retains such acknowledgement, together with all other documents, if any, setting forth the terms of such credit sales on which the purchaser and seller have agreed, and such dealer or market agency retains a copy thereof, in his records for such time as is required by any law, or by written notice served on such person by the Administrator, but not less than two calendar years from the date of expiration of the written agreement referred to in such acknowledgement; and

(3) such seller receives a copy of such acknowledgement.

(b) Purchasing livestock for which payment is to be made by a draft which is not a check, shall constitute purchasing such livestock on credit within the meaning of paragraph (a) of this section. (See also §201.43(b)(1).)

(c) The provisions of this section shall not be construed to permit any transaction prohibited by §201.61(a) relating to financing by market agencies selling on a commission basis, or by §201.68 relating to financing packers by dealers or vice versa.

Office - Supreme Court, U.S.
FILED
AUG 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-26

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1982

THE FIRST STATE BANK OF MIAMI,

Petitioner

v.

GOTHAM PROVISION COMPANY, INC.,
et al.

Respondents.

RESPONDENTS LYKES BROTHERS, INC., UNITED STATES SUGAR CORPORATION AND D. R. KILPATRICK BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Aubrey V. Kendall
(Counsel of Record)
Timothy J. Norris
Edward T. O'Donnell
MERSHON, SAWYER, JOHNSTON,
DUNWODY & COLE
1600 Southeast Bank Building
Miami, Florida 33131
(305) 358-5100

Attorneys for Respondents
Lykes Brothers, Inc., United
States Sugar Corporation and
D. R. Kilpatrick

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the three courts below erred in holding that the Respondents did not sell their livestock to a packer under "express" credit agreements, within the meaning of §196 of the Packers and Stockyards Act of 1921 and the regulations of the U.S. Department of Agriculture?

2. Whether the findings of fact by the Bankruptcy Judge, which the District Court and the Court of Appeals have upheld, are "clearly erroneous"?

3. Whether unsubstantiated predictions that the statute will have undesirable economic effects are an appropriate basis for certiorari?

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LIST OF SUBSIDIARY AND AFFILIATED COMPANIES

Lykes Brothers, Inc.
Tampa, Florida

Subsidiaries

1. Hillsboro Building, Inc.	Tampa, Florida
2. Lykes Brothers Insurance Agency	Tampa, Florida
3. Lykes Pasco Packing Co.	Dade City, Florida
4. M & M Supply Company of Florida, Inc.	Thonotosassa, Florida

United States Sugar Corporation
Clewiston, Florida

Subsidiaries

None

COUNTERSTATEMENT OF THE CASE

The Gotham Provision Company, Inc., a federally-regulated meat packer, went bankrupt in March of 1979.[1/] The dispute arose between The First State Bank of Miami and certain of the cattle producers over their respective rights to some of Gotham's accounts receivable under the 1976 amendments to the Packers and Stockyards Act of 1921, 7 U.S.C. §181, et seq. The producers included the Respondents in this matter, Lykes Brothers, Inc., United States Sugar Corporation, Rogers Farm, Inc., D.R. Kilpatrick, W.D. Roberts, Ronnie Perkins and Robbie Addison.

1/ Therefore this dispute arose in a case under the Bankruptcy Act of 1898, as amended, and not under the Bankruptcy Reform Act of 1978.

The cattle producers contended that under the statute the receivables were assets to be held in trust for cattle sellers. The bank argued that Gotham often had been late in paying the Respondents and that this made the latter "credit" sellers and, therefore, not entitled to the protection of the Act.

The Bankruptcy Court found that the facts did not support the bank's arguments and those findings (as to these Respondents) were upheld by the District Court and the Court of Appeals.

(a) The statute and its background

Between 1958 and 1975, 167 packers went bankrupt, leaving producers unpaid for $43,000,000 in livestock. Senate Rept. No. 94-932, 94th Cong., 2d Sess., at 5, reprinted in [1976] U.S. Code

Cong. & Admin. News 2267 (hereinafter Senate Rept.).

In 1974, the United States Supreme Court reversed a holding of the Fifth Circuit giving cattle producers, rather than secured lenders, priority to the assets of a bankrupt packer. That decision, Mahon v. Stowers, 416 U.S. 100 (1974), reasoned that the Packers and Stockyards Act of 1921 did not create a trust in favor of unpaid producers, 416 U.S. at 113. One year later, American Beef Packers, Inc. (hereinafter ABP), failed, owing producers in 13 states a total of $20,000,000. Their efforts to collect from ABP's assets were defeated by a lien on the bankrupt's inventory held by its principal lender.

In response, Congress amended the Packers and Stockyards Act. See Senate Rept. No. 94-932, 94th Cong., 2d Sess.,

reprinted in [1976] U.S. Code Cong. & Admin. News 2267. The changes were designed to safeguard producers against such losses in the future. Section 206 gives unpaid cattle sellers a trust on the livestock, inventory, accounts receivable and meat product proceeds of a packer which defaults. The statute also gives producer-sellers precedence over liens held by lenders. Indeed, Congress explicitly declared (7 U.S.C. §196(a)) that lenders' encumbrances on packers' inventory, accounts receivable and related assets are "an obstruction to commerce" and "contrary to the public interest" to the extent that they deprive sellers of livestock of payment.

The trust provisions apply only to packers whose average annual purchases exceed $500,000 and only protect "cash-basis" livestock sellers, 7 U.S.C.

§196(b). The statute defines the latter term broadly, however, in order to further the remedial purpose of the legislation.

Because of the nature of livestock transactions and custom in the industry, funds usually are not transferred as soon as the livestock leaves the producers' possession.2/ The statute, however, declares that all sales are deemed to be for "cash" for purposes of the trust, unless the seller expressly

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2/ Livestock often must be moved a long distance by common carrier to the packer. In addition, sales are sometimes based on the "dressed weight;" these transactions are called "grade and yield" sales. Live weight sales, unless conducted at a stockyard, generally require weighing at the packer's plant upon arrival at the plant, thereby precluding payment at the producer's farm. As regards "grade and yield" sales, the dressed weight cannot be determined until the livestock is slaughtered.

agrees to extend credit to the packer. 7 U.S.C. §196(c).[3/]

The trust created by the statute and regulations necessarily increases the risk to lenders and others who must compete with the producer for payment. The risk is tempered, however, by 7

3/ The protection was carried further by 7 U.S.C. §228b. This provision codified an existing U.S. Department of Agriculture rule that an agreement for the purchase of cattle on credit must be in writing. See 9 C.F.R. §201.43, issued at 29 Fed. Reg. 1795 (February 6, 1964). See also 9 C.F.R. §201.200. As a result all sales are considered to be for cash and the purchaser is obligated to make payment on the business day immediately following delivery of the livestock, unless the packer and the producer execute an express written credit agreement. A similar regulation states that a producer will lose the protection of the trust only if he executes a written document expressly waiving his rights to the protection given him under the statute. (9 C.F.R. §201.200).

U.S.C. §196(b), which says that a producer who sells on a cash basis must serve notice on the packer within 30 days of the date payment is due (or within 15 days after notice of a dishonored payment instrument) if he is not paid and wishes the protection of the statute. He also must file a copy of the notice with the Secretary of Agriculture.

(b) The events of this case

The bank's claim arose from a $450,000 line of credit it granted to Gotham. As part of that arrangement, the bank was to collect Gotham's accounts receivable and transfer funds to Gotham's operating account.

The loan balance remained at approximately $450,000 from the Spring of 1978 until early 1979. Late in

February of the latter year, however, the bank began to apply Gotham's accounts receivable against the loan balance, without advancing any replacement funds to Gotham's operating account. Between February 28 and March 19, 1979 the bank applied more than $300,000 of Gotham's receivables. This reduced the amount owed to it from $450,000 to $112,324. (T.R. 1-63).[4/] Gotham did fail; and the livestock producers were not paid. When the bankruptcy petition was filed on March 9, 1979 Gotham had completely depleted its inventory of meat products (T.R. 1-99).

4/ "T.R." refers to the transcript of the trial proceedings held before the Bankruptcy Court.

The bank's basic contention below was that Gotham often failed to pay promptly. From that premise, it argued that the Respondents should be considered "credit" sellers, not cash sellers, and, therefore, that they were not entitled to the protection which 7 U.S.C. §196 gives to cattle producers. The Bankruptcy Court rejected that contention.

Bankruptcy Judge Sidney M. Weaver noted that the statute says the trust can be waived only by an express credit agreement. After reviewing the documents and the testimony of one of the bankrupt's principal officers and indicating that he did not find it credible on this issue, he found that "the course of conduct of these livestock sellers did not amount to an extension of credit, let alone an express extension of credit."

SUMMARY OF ARGUMENT

Each of the lower courts has pointed out that the bank's argument would negate both the plain language of the statutory trust provisions and the legislative intention.

The purpose of the 1976 amendments of the Packers and Stockyards Act was to protect cattle producers. The basic technique was to make it clear that a bank which made loans to a packer bore the risk of default unless the rancher or other producer "expressly" agreed - in writing - to extend credit to the packer. This rule means that each side knows where it stands. In contrast, if the question of "credit" or "cash" sale were to be debated in the light of "late payments" or other circumstances of each case, the situation would be highly

uncertain. Further, the statute's basic purpose - protecting cattle producers whom Congress considered to be important to the national well being - would be jeopardized.

The Petitioner makes only passing reference to the statutory language and the legislative history. It contends, instead, that the interpretation accepted by the courts below would have undesirable economic consequences and, accordingly, that it cannot reflect the Congressional intention. This is only lawyers' argument - no evidence supports it. In contrast, the opinions of the three courts below set forth extensive extracts from the legislative history as well as a compelling analysis of the statutory language. These show that Congress realized that the amendments had to increase the risk to lenders

somewhat if cattle producers were to be given additional protection. Thus the petition has no merit.

Moreover if, arguendo, there could be some reason for this Court to review the statute in question, this petition is not the appropriate occasion.

This case presents no conflict. If there is a "federal question" it is one as to which there presently is unanimity among the courts. Indeed, only one Court of Appeals has even considered the matter. Much of the petition discusses a hypothetical "worst case" rather than the actual "case or controversy" which is essential to jurisdiction.

The facts, for present purposes, are the findings of the Bankruptcy Court. Those findings are not reconcilable with the bank's theories; and the District Court and the Court of

Appeals each have found that they are not clearly erroneous.

The Petitioner's economic arguments, moreover, are speculation, unsupported by the record. It offered no expert testimony at trial. Thus any evil economic consequences of the statute - the heart of the bank's argument - have not yet been documented. Even more important, if the Petitioner's contentions had a solid foundation in fact, they still would remain economic rather than legal arguments. Such claims might be suitable to a political campaign to have Congress amend the statute. But they are not appropriate to a petition for certiorari.

ARGUMENT

I. THE DECISIONS BELOW ARE FAIR AND AN ACCURATE INTERPRETATION OF THE STATUTORY TEXT AND LEGISLATIVE HISTORY

As the petition itself points out (P. 13), Congress realized that there is no way to eliminate all loss when a large meat packing company goes bankrupt. The statute is an effort to distribute that inevitable loss in a manner Congress thought to be reasonably fair and in the national interest, taking into account the relative positions of the banks and the producers.

The few portions of the legislative history which the Petitioner cites are wholly inconclusive. Their weakness is particularly apparent in the face of the scholarly analysis of the text and legislative history in the successive

Bankruptcy Court, District Court and Fifth Circuit opinions. Suffice it to say that the draftsmen, responding to the distress caused by major bankruptcies like that of ABP, clearly made the right of the cattle producers superior to those of secured lenders. They also left room for the exceptional case by the provision that the cattlemen would not have that protection if they expressly agreed to sell their cattle on "credit".

Both the dictionary meaning of "express" and the construction which federal courts have given that term in other statutes support the simple idea that an implied agreement is not an express agreement.[5/] Further, the

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5/ See Richardson v. United States, 190 F.Supp. 369, 375 (D.Wyo. 1961):

> Presumably Congress used the word "express" with the

Footnote Continued

Petitioner's argument would mean, in practice, that any packer which delayed paying its bills could deprive the producers of their rights. Unless the seller (usually a much smaller business if not an individual rancher) were bold enough to cut off his major customer for a few late payments, he would lose the protection of the statutory trust. This would fall far short of the meaningful

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Footnote Continued From Previous Page

> intention that it carry its ordinarily accepted meaning. [citations omitted] It means "directly and distinctly stated", "not merely implied or left to inference". Webster's New International Dictionary of The English Language, 2nd Ed., 1945.

Compare Baltimore & Ohio R.R. v. United States, 261 U.S. 592, 597 (1923) where the court defined an implied agreement as one "inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."

protection which Congress intended when it revised the Packers and Stockyards Act after the ABP disaster.

(a) The bank had notice of the statute and could have taken steps to avoid assuming the risk

The Petitioner's suggestion that the Respondents should be estopped flatly contradicts the findings of fact by the Bankruptcy Judge.

Having considered both documentary evidence and the demeanor of the witnesses, Judge Weaver found that the sellers did not enter into any oral or written contracts to extend credit to the packer. (A. 46).[6/] Further, he found that Gotham had not been unreasonably late in its payments so

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6/ "A." refers to the Appendix to the Petitioner's Brief.

that there was no factual foundation for the argument that continued acceptance of late payments could be either an implied agreement or conduct misleading to the bank. (A. 46).

Indeed, far from finding the basis for an estoppel, the Judge stated that the bank knew Gotham was in financial difficulty (A. 41) when it took steps to reduce the outstanding balance. Thus it did not give up any right because it was deceived by the cattle producers; if anything, the bank took steps which exceeded its rights.

Further, the bank has never explained how the cattle producers "deceived" it by following procedures set forth under the statute.[7/] It merely

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7/ A cattle seller has thirty days to preserve his trust benefits by filing a notice. Thus even if the

Footnote Continued

suggests vaguely that the statute, as interpreted by all of the lower courts, is unfair because it leaves the bank or other lender in a position of unexpected peril.

In reality, this bank, like every other, was far from helpless, and any peril should not have been unexpected.

Footnote Continued From Previous Page

bank had satisfied the Bankruptcy Judge that there was a pattern of significantly late payment in this case, that would not mean the sale was for "credit." Logically, the requirement that the packer pay on the next business day is for the protection of the producer, not third parties; and Congress must have contemplated an interval of uncertainty for third-party lenders when it gave the producers thirty days in which to file rather than that unspecified but far shorter period the bank apparently would permit.

The Petitioner's talk of "secret liens" and a "lack of notice" is mere rhetoric. The statute had been on the books since 1976. The bank was charged with notice of its existence. The petition, in fact, says that other banks understood the significance of the legislation[8/] and that some of them decided not to make such loans because the risk seemed excessive. The Petitioner continued to make the loans.

8/ While some institutions opposed the enactment of the trust provisions, the Independent Bankers Association gave the proposals its support. That group argued that "the fiduciary route would enhance packers as a loan customer because this provision would force them to keep more accurate records of such things as what is owed, inventory, and accounts receivable." Report of Business Meetings on H.R. 8410, House Committee on Agriculture, H.R. No. 94-1043 (April 14, 1976), 94th Cong., 2d Sess. at 65.

Nothing in the record suggested the producers had anything to do with that decision; or that it was anything other than a business judgment by one bank - but not others - that the potential profits of the loans seemed high enough to justify the risk.

Equally significant, the Petitioner could have taken a variety of steps to reduce the risks it assumed at that point. Unlike the cattle producers, the bank had the resources and ability to review Gotham's financial records and analyze Gotham's short term and long term financial prospects. This meant it could assess, regularly, the wisdom of continuing to make loans in view of the ratio of Gotham's assets to its debts and, more particularly, the amounts which might be owed to cash basis livestock sellers.

Moreover the bank had an express arrangement with Gotham. Under that contract it could have demanded that Gotham provide collateral above and beyond its inventory, accounts receivable and sales proceeds.

(b) The Petitioner's estoppel argument would require the Court to reexamine questions of fact which already have been subjected to three levels of judicial scrutiny and, also, to set aside specific fact findings by the Bankruptcy Judge

We suggest that the evidence shows that a business risk went bad and a professional lender suffered a loss - nothing more. But the question at this late stage is not whether the Court agrees with the suggestions of the Petitioner or the Respondents as to the manner in which a prudent bank would have behaved. The mere existence of

that fact dispute makes this case unsuitable for a third level of review.

The Supreme Court repeatedly has said that it is a "court of law" rather than a "court for the correction of errors" and, consequently, that it cannot review findings of fact which have been upheld by two courts, absent obvious and exceptional error. Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1948); Berenyi v. Immigration & Naturalization Service, 385 U.S. 630, 635 (1967). Each of the Petitioner's legal contentions depends on factual premises which cannot be reconciled with Judge Weaver's findings. Further, both the District Court and the Court of Appeals have rejected the arguments of the Petitioner that those findings were "clearly erroneous".

II. THIS CASE IS NOT APPROPRIATE FOR CERTIORARI

(a) The petition does not point to any conflict

The petition points to no conflict among the circuits and to no conflict between the decisions of the Fifth Circuit and the United States Supreme Court. Nor does it mention any other conflict. In fact, those District and Bankruptcy Court opinions which have considered Section 196 are entirely consistent with the Fifth Circuit's interpretation. See Fillippo v. S. Bonaccurso & Sons, Inc., 466 F.Supp. 1008 (E.D.Pa. 1978); Hedrick v. S. Bonaccurso & Sons, Inc., 466 F.Supp. 1025 (E.D.Pa. 1978); In re Federal Packing Co., No. 78-1492-BK-CA-B (S.D.Fla., April 23, 1979); In re Frosty Morn Meats, Inc., No. BK 77-31707 (M.D.Tenn., Aug. 31, 1978).

The Petitioner itself emphasizes that this is the first appellate opinion to deal with the amendments of the Packers and Stockyards Act. The bank, however, does not point to any urgency which might justify its demand that the Court grant certiorari in the first such case to reach the circuit level.

For our part, we urge that if the Court is concerned with the economic implications of the amendments, it would be undesirable to grant certiorari before other circuits have had an opportunity to consider the problem. See White Motor Co. v. United States, 372 U.S. 253 (1963), where the Court declined to make a significant antitrust ruling because it lacked information as to the economic and social consequences of the business practices in question.

(b) Many of the "facts" essential to the bank's argument are hypothetical at best

The petition discusses a scenario in which a rancher agrees to sign a credit agreement and throws it away, while engaging in dialogue with a representative of the Department of Agriculture. (p. 12). To be fair, the petition makes it clear that these "facts" did not happen and that they were conjured up for the sake of argument. Yet the principle is well established that the United States Supreme Court will not issue an advisory opinion on a hypothetical. Muskrat v. United States, 219 U.S. 346 (1911); United Public Workers v. Mitchell, 330 U.S. 75 (1947).

The Petitioners' final argument (p. 18) that the telephone company and every other business also would be "liable" has even less relationship to this case. The statutes in question deal with the relationship between creditors of a packer and cattle producers, nothing more.

(c) Congress has dealt with the area recently and may do so again

An article the Petitioner itself cites, Burke, U.C.C Annual Survey, 32 Business Lawyer 1133, 1154 (1977), states that Congress and a number of state legislatures were displeased with the conclusion which a commercial law analysis led to in Mahon v. Stowers, supra, and that they amended federal and state legislation in 1975 and 1976 to give greater protection to the producer.

This history suggests that if the Court were to take the time to examine the economics of the cattle business once more, it would have to do so in the realization that those efforts might well be nullified once more, or rendered moot, by impending legislative action.9/

(d) Congress is the appropriate forum for the Petitioner's argument that the statute will have undesirable economic consequences

Unhappy at the result of the case, the Petitioner predicts that the precedent will lead banks to stop making loans to packers and this in turn will lead to monopoly and chaos in the cattle business.

9/ The Petitioner mentions that a number of bills now are pending before the House and Senate which deal with aspects of the conflict between lenders and the producers of agricultural commodities. (p. 8). The Court's efforts might well be wasted.

Yet the bank did not provide the Bankruptcy Court with any expert testimony to support such a prediction. Even at this stage, the only material it cites to support the grim prognosis is a brief extract from the Business Lawyer. That article appeared in 1977. This is 1982. Where is the monopoly? Why has the bank no evidence of actual chaos in the markets?

Had the marketplace actually collapsed or were such a peril serious, it seems likely that other banks and lenders would have sought to support the Petitioner's warnings. Yet the only amicus is the Department of Agriculture. The Department, an interested third party, supports the position of the Respondents.

More important, if the predictions of the Petitioner's counsel concerning the economic consequences of the Act were plausible and supported by expert testimony and statistical data, they still would be in the wrong forum. It is the responsiblity of Congress, not the Supreme Court, to make economic judgments.

The Petitioner misses the point when it says (p. 13) that the bank is not guilty of a breach of trust and that lending institutions have a valid social function. No one questions either proposition. But the producers also have a valid function.

As the Petitioner says (p. 8), there is a natural conflict between the needs of ranchers, farmers and others who raise cattle and those banks which

are in the business of making loans to packers. Faced with a difficult policy choice, Congress passed several statutes which changed the balance somewhat, in favor of the producers. The legislative history shows that the draftsmen did so because they concluded that producers need more protection than do banks and that their role in agriculture makes it part of the national interest to shield them to a greater extent.

This case does not offer the Court either an opportunity or a reason to challenge that legislative judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MERSHON, SAWYER, JOHNSTON,
DUNWODY & COLE
Counsel for Respondents
Lykes Brothers, Inc.,
United States Sugar
Corporation and
D. R. Kilpatrick
1600 Southeast Bank Building
Miami, Florida 33131
Telephone (305) 358-5100

By Aubrey V. Kendall
Aubrey V. Kendall, P.A.
Counsel of Record

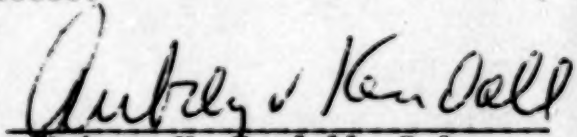
Timothy J. Norris
Of Counsel
Edward T. O'Donnell
On the Brief

Dated: August 3, 1982

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 3rd day of August, 1982, three copies of the Respondents Lykes Brothers, Inc., United States Sugar Corporation and D. R. Kilpatrick Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Robert J. Paterno, Esq., Taylor, Brion, Buker & Greene, 1451 Brickell Avenue, Miami, Florida 33131; Ernest W. Dean, Jr., Esq., MacFarlane, Ferguson, Allison & Kelly, P.O. Box 1531, Tampa, Florida 33601; Gregory P. Borgognoni, Esq., Shutts & Bowen, 1000 Southeast Bank Building, Miami, Florida 33131; Britton, Cohen, Kaufman & Schantz, 800 Southeast Bank Building, Miami, Florida 33131; Martin L. Sandler, Esq., Broad & Cassel, 1033 City National Bank Building, 25

West Flagler Street, Miami, Florida 33130; Papy, Duval & Poole, 201 Alhambra Circle, Suite 502, Coral Gables, Florida 33134; Eric Paul, Esq., Office of the General Counsel, Packers & Stockyards Division, United States Department of Agriculture, Washington, D.C. 20250; and Anthony J. Steinmeyer, Esq., Mr. Al J. Daniel, Jr., Department of Justice, Civil Division, Appellate Staff, Washington, D.C. 20530.

By 
Aubrey V. Kendall, P.A.

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Supreme Court

of the

United States

October Term, 1982

THE FIRST STATE BANK OF MIAMI,
Petitioner

vs.

GOTHAM PROVISION COMPANY, INC. ET AL.,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Robert J. Paterno
James C. Pilkey
Taylor, Brion, Buker & Greene
1451 Brickell Avenue
Miami, Florida 33131
305-377-6700
Counsel for Petitioner

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REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI 1

A LISTING COMPLYING WITH SUPREME COURT RULE 28 IS INCLUDED IN THE PETITION FOR CERTIORARI

REPLY

Respondents' brief in opposition raises several arguments for the first time. Since most of these arguments are not really responsive to the petition or the "certworthiness" of this case, no reply is necessary. Unfortunately, however, a reply could not be entirely avoided.

On pages 8-9 of their opposing brief, Respondents chose to make an egregious misstatement of the facts which must be clarified in order to keep this case in the proper focus. Respondents state:

> The loan balance remained at approximately $450,000.00 from the Spring of 1978 until early 1979. Late in February of the latter year, however, the bank began to apply Gotham's accounts receivable against the loan balance, without advancing any replacement funds to Gotham's operating account. Between February 28th and March 19, 1979, the bank applied more than $300,000 of Gotham's receivables. This reduced the amount owed to it from $450,000 to $112,324.00. (T. R. 1-63).

This statement, complete with its erroneous citation to the record, appears to be miscopied from a similar misstatement in the *amicus* brief filed by the U.S.D.A. before the Fifth Circuit. (See *Amicus* Brief at 7). If this statement were remotely correct, it is highly unlikely the Bank would be pursuing an appeal all the way to this Court.

Not only does this statement ignore the day-to-day nature of the Bank's advances, but the record reveals that precisely the opposite situation is true. According to the expert witness, *called by these cattle sellers,* the Bank advanced over $751,000 during the same period Respondents now claim the Bank was not advancing funds. (Sept. 7, TR. 211).

Throughout this case, there has been no question that the Bank acted in good faith and in the ordinary course of business. The Bank's arrangement with Gotham was endorsed and expected under the amended Act. The Bank's participation could do nothing but help cattle sellers. The Bank did not refuse to advance funds, it did not seize the packer's assets, it did not force the packer into bankruptcy. Instead, it continued advancing funds to the packer through and beyond bankruptcy.

Just prior to bankruptcy, the Bank advanced to the packer-trustee nearly three times more than these cattle sellers total claims. There is no dispute that the packer, as trustee, should have used these funds to pay the cattle sellers. The very purpose of the Bank's arrangement with Gotham was to provide immediate cash for the payment of these bills on a continuing basis. The question this Court must answer is whether the Bank, having already given the trustee the funds to pay its bills, can be held liable for the trustee's failure to properly apply those funds.

Respectfully submitted

ROBERT J. PATERNO
JAMES C. PILKEY
TAYLOR, BRION, BUKER & GREENE
Counsel for Petitioner
1451 Brickell Avenue
Miami, Florida 33131
(305) 377-6700

August 23, 1982